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LAW OF TORTS

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INCLUDING THE CONSUMER PROTECTION ACT, 2019 AND THE MOTOR VEHICLES (AMENDMENT) ACT, 2019

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NEW SYLLABUS

(FROM 2018 ONWARDS)

COURSE – III : LAW OF TORTS

Objectives:

This course is designed to study the principles of Tortious liability, the defences available in an action for torts, the capacity of parties to sue and be sued and matters connection there with. Further, this course is designed to study specific torts against the individual and property. With rapid industrialization, inadequacy of the law to protect the individual is exposed. An attempt shall be accorded to the individuals against mass torts and industrial torts. Keeping in the expensive character of judicial proceedings the students should reflect on the alternative forms, and also the remedies provided under the *Consumer Protection Act, 1986.*

COURSE CONTENTS:

UNIT-I

Evolution of law of torts- Nature and scope of law of torts- Meaning- Torts distinguished from Contract- Crime- Development of *Ubi jus ibi Remedium*- Mental elements-Intention, Motive, Malice in Law and in Fact.

UNIT-II

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LAW OF TORTS

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*** *In the margin of the index denotes* ***'most important'*** *Short note.*

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LEGAL MAXIMS AND THEIR MEANING

1. **RIGHT IN PERSONAM:** (General principles of torts) Right available against a particular individual or group of individuals.

2. **RIGHT IN REM:** (General principles of torts) Right available against the whole world.

3. **UBI JUS IBI REMEDIUM:** (General principles of torts) where there is a legal right, there is a legal remedy.

4. **DAMNUM SINE INJURIA:** (Basis for the right to sue in torts) Damage or loss without violation of legal right i.e., where there is no violation of any legal right, there is no remedy eventhough there is substantial loss or damage.

5. **INJURIA SINE DAMNUM:** (Basis for the right to sue in torts) Violation of legal right without damage or loss i.e., where there is violation of any legal right, there is remedy, even though there is no loss or damage.

6. **ACTIO PERSONALIS MORITUR CUM PERSONA:** (General principles of torts) The Right of action (right to sue) dies with the death of the person.

7. **CALPA INELEGANDO:** (Master and Servant or Vicarious Liability) 'Master's carelessness in selection of a good servant'.

8. **ULTRA VIRES:** (Master and Servant or Vicarious Liability) Acts exceeding the authority of a person.

9. **VOLENTI NON FIT INJURIA:** (Defence to tortious acts) Implied consent to face the risk i.e., When a person has expressly or impliedly consented to any act, for such act, no action lies.

10. **SCIENTI NON FIT INJURIA:** (Defence to tortious acts) Implied knowledge to face the risk i.e., when a person has express or implied knowledge towards any act, for such act no action lies.

11. **INJURE NON REMOTA CAUSA SED PROXIMA SPECTATUR:** (Remoteness of Damage) In law, only immediate and not remote cause of any event is considered, i.e., for remote damage or loss, there can be no action.

12. **CAUSA CAUSANS:** (Remoteness of damage) The real cause or causes of loss or damage.

13. **CAUSA SINE QUA NON:** (Remoteness of damage) The real cause, without which, the event would not have happened.

14. **SON ASSAULT DEMESNE:** (Defences of tortious acts) The act complained of by the plaintiff, was the effect of his own attack.

15. **NECESSITATIS NON HABET LEGUM:** (Defence of Tortious Acts) Necessity known no law.

16. **ACTIONABLE PER SE:** (Libel and slander - Defamation) Action lies even without proof of damage or loss.

17. **ROLLED UP PLEA:** (Defamation) Plea of fair comment i.e., fair and bonafide comment is a defence to defamation.

18. **CALPA LATA:** (Negligence) Failure to show any reasonable care at all.

19. **CALPA LEVIS IN CONCRETO:** (Negligence) Failure to show ordinary care and diligence.

20. **IMPERITIA CALPA ADNUMERATUR:** (Negligence) Lack of skill is treated as a fault or negligence.

21. **INNUENDO:** (Defamation) words, which are not ordinarily defamatory, becomes defamatory because of the peculiar circumstances in which they are uttered.

22. **RES IPSA LOQUITUR:** (Gross Negligence) The thing speaks for itself i.e. the accident itself constitutes reasonable evidence of negligence in the peculiar circumstances of the case.

23. **SIC UTERE TUO UT ALIENUM NON LAEDAM:** (Absolute Liability Basis) Every one must use his own things in such a way as not to do harm or damage to another.

24. **SIC UTERE TUO UT TEMETIPSUM NON LAEDAM:** (Absolute liability basis) It is in the interest of the individual owner himself that he should use his things as not to affect others.

25. **SIC UTERE TUO UT TEMETIPSUM NON LAEDAM:** (Absolute liability basis) It is in the interest of the individual owner himself that he should use his things as not to affect others.

26. **DE MORUTUS NIL NISI BONUS:** (General Principles of torts) of the deceased everything is good, speak nothing but good.

27. **SCIENTER RULE:** (Dangerous Animals - Absolute Liability) The plaintiff's burden of proof of the dangerous character of the animal (Mansuetae naturae) to successfully sue in a Court of Law.

UNIT - I

1. EVOLUTION OF LAW OF TORTS- (ORIGIN AND DEVELOPMENT OF LAW OF TORTS IN INDIA)

SYNOPSIS:

A. *Introduction*
B. *Law of Torts in India*
C. *Development of Law of Torts in India*
D. *Recent developments in Law of Torts in India*
E. *Reasons for slow development of the Law of Torts in India*

A. INTRODUCTION:

The term **'tort'** is derived from a latin term **'tortum'** which means **'twisted'** (not straight or lawful).

The term 'tort' was introduced in the English law by the Norman jurists. Initially, the term 'tort' was used for certain special wrongs by English Courts and later on, it was used all civil wrongs.

Further, the tortious wrongs owe their origin to the writs of trespass granted by the English Courts, when there was trespass by one person in the land of another person. The main reason for the growth of law of torts in English Law was due to the reason that the system of administration

of justice was simple, inexpensive and fast and hence, even for small violations of legal rights, the English people approach the Courts for remedy.

B. LAW OF TORTS IN INDIA:

In India, the origin of law of torts can be linked with the establishment of the British Courts in India. The law of torts, for the first time, was introduced in India through the British Mayor Courts.

The Mayor Courts were established by the British Parliament through the Charter Act of 1726 in the three presidency towns of Calcutta, Bombay and Madras. Later on, these Courts were replaced by the Supreme Courts in these three presidency towns. The Supreme Courts also had jurisdiction to hear tort cases.

In India, the law of torts, as followed in English law, is still being followed by Indian Courts. The English law of torts has been modified to suit the Indian conditions.

Further, in India, since there are only a few Indian Case Laws in law of Torts and that the law has not been fully codified, the Indian Courts still depend on the English judgments.

Thus the Law of Torts in India is still based on the Common law of England. In absence of any codified law in Torts, the Indian Courts apply the rules of justice, equity and good conscience in deciding the tort cases.

C. DEVELOPMENT OF LAW OF TORTS IN INDIA:

In India, the development process of law of torts was very slow and it started very late. The development of law of torts in India started only after the development of the modern science in the seventeenth century.

The main reason for the slow development of law of torts is that the majority of the Indian population were poor, illiterate and lived in villages. They neither had formal education nor had any knowledge about their legal rights.

Further, they were unaware of how to establish their rights in any Court of Law. Since the cost of litigation in India was very expensive and there was delay in deciding the cases by the Courts, the poor litigants rarely approached the Courts for remedies.

Instead, they were reconciled as if it were their fate to suffer. This is the main reason for the slow growth of law of torts in India.

D. RECENT DEVELOPMENTS IN LAW OF TORTS IN INDIA:

1. In the last 50 years, especially after independence, the law of torts in India has been fairly growing. It is mainly because of the higher rate of literacy and also the wide circulation of news media both through press and electronics. Now, the people are becoming more conscious of their legal rights and also the means of remedies through Courts of law.

2. The process of codification of many tortious laws have made the law more certain and easily accessible by the people. For e.g.: The Motors Vehicles Act, 1988 is a very useful legislation in the tort of negligence and the affected victims can easily approach the Motor Accident Claim Tribunals for compensation.

The Court fee is nominal and the process of claim settlement is speedy. There is a provision for compulsory compensation to be given in 'hit and run cases' under the principle of 'no fault liability'.

3. In ***M.C. Mehta Vs. Union of India (Bhopal Tragedy Case)***, the Supreme Court of India have distinguished and further advanced the doctrine of absolute/strict liability from the already existing strict/absolute liability doctrine laid down in Ryland Vs. Fletcher in 1868.

The Supreme Court observed that if an industry is engaged in a hazardous or inherently dangerous activity and if harm/injury results to anyone on account of an accident in the operation of such hazardous activity - for e.g., escape of toxic gas, etc., then such industry is strictly and absolutely liable to compensate all the victims affected by the accident.

The Court held that such absolute liability is **not subject to any of the exceptions** as laid down in the rule in Rylands Vs. Fletcher. Further, the Indian Parliament has codified many of the civil wrongs.

For e.g.: The Indian Carriers Act 1865, The Copyright Act 1957, The Patent Act 1970, The Trade Marks Act 1999, The Sale of Goods Act 1930, The Consumer Protection Act 1986 etc., which shows that there is growth of law of torts in India.

E. REASONS FOR SLOW DEVELOPMENT OF LAW OF TORTS IN INDIA:

Despite the above growth and progress of law of torts in India, still the law of torts is not growing in India at a faster rate as it grows in England and other Western Countries.

The following are the main reasons -

1. The law of torts is not a codified law and it is still a developing law. Because the law is not codified, there is no uniformity and certainty in the various rules of tort.

   Further, the judgments in law of torts are not uniform. Since the number of Court cases in law of torts are very few, there is lack of precedents. Many of the 'English law precedents' could not be made applicable to Indian cases because of the different situations, varied life style, etc., In other words, the English judgments are not pragmatic nor suited to the living conditions in India.

2. The majority of Indian population are illiterates and have no knowledge of their legal rights. They rarely approach the Courts to seek remedies against the violation of their rights.

3. Most of the Indian population is economically backward and they are so poor that they cannot meet the high cost of litigation for enforcement of their rights through legal forums.

4. The cost of litigation in Indian Courts is very expensive. The Court fees and the lawyer fees, etc., are very high. Besides, there is undue delay in deciding the cases by Courts.

5. Tort is a civil wrong and it is not a major crime. The remedy is claim for unliquidated (unspecified) damages (compensation).

   Generally, for small torts like - assault, battery, slander, tort to domestic relations, trespass to immovable property etc., the people in India rarely seek judicial remedies.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the origin and development of law of torts in India.*
2. *The growth of law of torts in India is slow - Discuss*
3. *Write short note on : Origin and development of law of torts in India.*
4. *Explain origion and development of the Law of Torts in India and distinguish between Torts and Crime.*

2. NATURE AND SCOPE OF LAW OF TORTS- MEANING- TORTS DISTINGUISHED FROM CONTRACT- CRIME (DEFINITION AND INGREDIENTS OF TORTS)

(MOST IMPORTANT)

SYNOPSIS:

A. *Definition of Tort*

B. *Characteristics (Nature) of Torts*

C. *Functions and purposes (Scope) of law of Torts*

D. *Difference between Torts and Crimes*

E. *Difference between Tort and Breach of Contract*

F. *Difference between Tort and Breach of trust*

G. *Difference between Tort and Quasi Contract*

A. DEFINITION OF TORT:

'Tort' means a civil wrong. It is a breach of duty. Such breach gives rise to a remedy to sue in a Civil Court. The Civil Court awards unliquidated damages, i.e., unspecified compensation.

1. SALMOND'S DEFINITION OF TORT:

A tort is 'a civil wrong for which the remedy is a common law action for unliquidated damages and which is

not exclusively the breach of a contract or the breach of trust or other merely equitable obligation'.

2. RATANLAL'S DEFINITION OF TORT:

A tort is 'a civil wrong, independent of contract for which the appropriate remedy is an action for damages'.

3. WINFIELD'S DEFINITION OF TORT :

Tortious liability arises from the breach of a duty primarily fixed by law. Such duty is towards persons generally and its breach is redressable by an action for unliquidated damages.

4. FRASER'S DEFINITION OF TORT:

Tort is an infringement of a right in rem of a private individual giving a right of compensation at the suit of the injured party.

5. SALMOND'S 'LAW OF TORTS' AND NOT 'LAWS OF TORT' OR 'LAWS OF TORTS':

According to Salmond, the law of torts consists of a number or specific rules each prohibiting certain harmful acts. So, it is only 'law of torts' and not a general law of tort.

It is not a mere general law, but contains classifications and specifications just like any other Act. That is why, Salmond observes that it is only a 'law of torts' and not 'law of tort',

It is not also 'laws of tort' because only specific rules prohibit specific, but many harmful acts. Because of this

specific rules for each tort and like this for many torts, it is only 'law of torts' and not 'laws of torts'.

6. Sir Frederick Pollock's 'Pigeon Hole Theory':

According to him, the Salmond's 'law of torts' is incorrect and it is comparable to a number of neat set of pigeon holes. Each pigeon hole acts as a specified tort. If any person does any wrong, then it will be seen whether it fits with any one of the pigeon holes. If it fits, it is a tort. If not, it is not a tort.

So, law of torts contains well recognized specific principles for different wrongs. Thus Sir Frederick Pollock criticises the Salmond's 'law of torts' which is similar to the Pigeon hole theory. There cannot be any new tort outside the already existing 'law of torts' which is incorrect according to Sir Frederick Pollock, as new torts are emerging now and then.

Criticisms:

1. If Salmond's theory is accepted, then new torts would not be recognized by Courts.

2. In ***Ashby Vs. White,*** it was held that 'mere novelty will not prevent a person from suing in tort'.

3. Sir Winfield held the view that all injuries done to another person are torts unless there is some justification recognized by law. So, according to him, the scope of torts is wide and not limited.

In conclusion, from practical point of view, Salmond's theory is not acceptable, but Winfield's theory is acceptable, because according to him, all injuries caused without legal justification can be treated as tort and hence there is scope for new types of torts to come in.

B. CHARACTERISTICS (NATURE) OF TORTS:

There are **five** characteristics of a tort. They are:

1. CIVIL WRONG:

A tort is a civil wrong and not a Crime. It is also a private wrong unlike a crime which is committed by violation of public rights and duties.

In order to succeed in an action for tort, the defendant must have done something which he is not supposed to have done or must have omitted to do something which he was supposed to have done.

It is not a breach of contract or a breach of trust because for breach of contract or for breach of trust, the remedy is available through a Statute. But in law of Torts, the remedy is available through common law.

2. INFRINGEMENT (VIOLATION) OF RIGHT IN REM:

'Right in rem' is the right available against the whole world. For e.g., if a person is defamed, he gets a right in rem. Every tort gives rise to a right in rem. This 'right in rem' is opposed to 'right in personam'. In right in personam,

the right is available only against some specific person or body of persons.

For e.g.: X agrees to sell his house to Y for a sum. X does not carry out his contract. Y will thereupon have a right to sue X for damages for breach of contract. Such rights are called right in personam.

Salmond uses the term 'duty towards persons generally' for 'right in rem' as opposed to duty towards some particular person/s namely 'right in personam'.

3. Right fixed by law:

The wrong is usually committed by violation of a right. Such right must be fixed or recognised by law. For e.g.: Negligence is an omission to observe a duty to be cautious and careful. The right fixed by law must be independent of the consent of the parties.

4. Common law action:

Though there is no specific Code or Act to give remedy to the injured party in tort, the common law gives a right to the injured person to take action against the wrong doer. In India, there is no common law. So the English common law is the guidance for taking action for a tort against the wrong doer.

5. Remedy:

Law of torts is based on the maxim ***'Ubi Jus Ibi remedium'*** meaning that where there is a right, there is a remedy.

In other words, there can be no wrong without a remedy. The remedy should always be by way of damages i.e., compensation in money. The money should not be specified and so the remedy is for unliquidated damages.

However, 'damages' is not the only remedy. Injunction, action for specific restitution of land or chattels and at times, even self help (as in ejecting a trespasser) are other remedies available in the case of torts.

According to Ratanlal, to constitute a tort or civil injury, the following **three** essentials are necessary:

1. There must be a wrongful act committed by a person.

2. The wrongful act must result in legal damage to another.

3. The wrongful act must be of such nature as to give rise to a legal remedy in the form of an action for damages.

C. FUNCTIONS AND PURPOSES (SCOPE) OF LAW OF TORTS:

The law of torts becomes applicable, when the actions and activities of certain persons cause threats to the interests of other persons. So the main purpose/aim of law of torts is that it attempts to adjust the losses that results due to the civil wrongs arising by the increasing interactions between persons living in common society.

It provides compensation to persons who suffer by violation of their legal rights by the conduct of other persons.

D. DIFFERENCE BETWEEN TORT AND CRIME:

TORT	CRIME
1. Civil wrong.	1. Criminal offence.
2. Private person takes action.	2. State or Police takes action.
3. Compensation is the remedy.	3. Punishment is by way of fine, imprisonment, etc.,
4. Civil Court hears the case.	4. Criminal Court tries the case.
5. No Legislation or Act for it. Only a common law or Judgement law or Case law governs the determination of compensation.	5. There is an Act called the Indian Penal Code (I.P.C), and other criminal legislations.
6. In case of death of a tort feasor, his legal representatives can be sued (except in defamation, assault, etc.)	6. Death of an offender puts an end to prosecution.
7. Limitation is a bar to an action in Tort.	7. Generally there is no bar of limitation to a prosecution for a crime except in certain cases as per Sec. 468 of Cr.P.C

E. DIFFERENCE BETWEEN TORT AND BREACH OF CONTRACT:

TORT	BREACH OF CONTRACT
1. Civil Wrong	1. Agreement is violated or breached.
2. Unliquidated damages or compensation. (Amount payable is not pre-determined and it is the discretion of the Court)	2. Liquidated damages specified in the contract. (Amount payable is predetermined)
3. There is no Act for this. Only common law is the basis.	3. There is an Act called the Indian Contract Act.
4. Right in Rem is violated duty towards persons or community)	4. Right in personam is violated (Duty towards specific person or persons, and based on privity of contract)
5. Law primarily fixes the duty violated.	5. The parties themselves fix duties.
6. Motive is relevant in assessing damages in case of tort.	6. It is not relevant in a contract.
7. A minor is liable in tort.	7. A minor's contract is void ab initio (from the beginning) and so he is not liable.

8. The damages are exemplary to punish the defendant	8. The damages are compensatory and it is fixed.

Sometimes, the same wrong may amount to a breach of a contract and a tort. Here, the injured person can take action against the wrong doer both for breach of contract and tort.

For e.g.: in physical training classes, if there is any new training method not covered under the terms and conditions of the contract is practised and in the process if a trainee sustains injuries, then he can take action against the defendant both for breach of contract and under law of tort.

F. DIFFERENCE BETWEEN TORT AND BREACH OF TRUST:

TORT	BREACH OF TRUST
1. Civil wrong.	1. Not a civil wrong.
2. Tort feasor pays the compensation.	2. The beneficiary pays the compensation.
3. Unliquidated damages (unfixed compensation).	3. Liquidated damages (fixed compensation).
4. Remedy is through common law action	4. Remedy is through Trust Act.
5. Violation of legal right	5. Breach of law of property

G. DIFFERENCE BETWEEN TORT AND QUASI CONTRACT:

TORT	QUASI CONTRACT
1. Damages for commission of civil wrong.	1. Duty to return a profit to which a person is not entitled (unjustified profit).
2. Unliquidated damages	2. Liquidated damages
3. Duty towards person in general.	3. Duty towards definite person.
4. Damages (compensation) for civil wrong committed.	4. Specific damages for services rendered (quantum meruit) or goods supplied (quantum valubent)

UNIVERSITY QUESTIONS FOR REVIEW:

1. *"Although tort is a civil wrong, not all civil wrongs are torts" - Explain and illustrate.*
2. *Discuss the definition of "tortious liability" given by Winfield.*
3. *Discuss the two competing theories as to the foundation of tortious liability.*
4. *Define tort and distinguish it from Crime, Contract, Quasi Contract and Breach of Trust.*

3. GENERAL CONDITIONS OF LIABILITY IN TORT

(LEGAL DAMAGE - DAMNUM SINE INJURIA, INJURIA SINE DAMNUM AND UBI JUS IBI REMEDIUM)

[MOST IMPORTANT]

SYNOPSIS:

A. *Legal damage*

1. *Damnum Sine Injuria*
2. *Injuria Sine Damnum*

B. *Ubi jus ibi remedium*

A. LEGAL DAMAGE:

'Damage' is the direct result of loss, etc., due to the defendant's wrongful act.

The term **'damage'** has a different meaning from its plural term namely **'damages'**. While the harm done to a person by the wrongful act of the defendant is a 'damage', the compensation paid to such person i.e., plaintiff by the defendant is called 'damages'.

In law of torts, an action for damages (claiming compensation) lies only when there is an infringement of an individual's legal right/s. In other words, in an action in tort, the plaintiff has to prove that he has suffered some 'legal damage' due to the defendant's wrongful act.

If there is no violation of legal rights of a person, then no action in tort will lie even if he suffers huge pecuniary loss. Similarly, there may be violation of legal right without any damage, still the plaintiff can claim damages from the defendant.

The concept of legal damage can be explained better through two maxims namely -

1. Damnum Sine Injuria 2. Injuria sine damnum

1. DAMNUM SINE INJURIA:

It means - **'the loss or damage without the violation of a law'**. Here, the loss or damage is caused without violating the legal right of a person. It is not an actionable wrong. Such loss or damage need not be very slight. It may even be irreparable.

There are many acts, which though harmful, are not wrongful and therefore give to rise to no right of action in favour of the injured party. Hence, the dictum: **'You must have, in our law, injury as well as damages'.**

Mere loss in money or money's worth does not by itself constitute legal damage. The most terrible harm may be inflicted by a man on another without violation of law. There are many acts, which, though harmful, are not wrongful and give no right of action.

Illustration:

X has a mill, and his neighbour sets up another mill and thereby the profits of X's mill fall. Now, X cannot bring an action against the neighbour and yet X has suffered damage. This is damnum sine injuria.

i. Gloucester Grammar School Case:

The plaintiff was running a school. Just opposite to this school, the defendant started a new school. The students of the plaintiff's school joined the defendant's school. The plaintiff suffered loss and hence sued the defendant for damages.

The Court held that the plaintiff could not claim damages, because his loss was caused without violation of any legal right of any person.

The general principle is that the exercise of ordinary rights within the reasonable limits do not give rise to an action in tort, merely because it causes damage to another.

In other words, it is impossible to carry on the common affairs of life without causing loss or inconvenience to others, for e.g., free and fair competition is always allowed.

ii. Mogul Steamship Co. Vs. MC. Gregor Gow & Co:

Certain ship owners formed an association to regulate a business. They gave rebates and earned much profits. The plaintiff, who was a ship owner, suffered loss and sued the defendants for compensation under the tort of conspiracy.

The Court held that the defendants were not liable, because their act was only for a bonafide competition and for trade interests.Here, the Court applied the doctrine of 'Damnum Sine Injuria' in deciding the case, and held that the defendants were not liable for the loss to the plaintiff.

iii. Ram Singh Vs. Benares Hindu University:

A University did not place the name of a student who had passed the examination in the list of successful candidates published by the University. The student could not successfully maintain an action, because no action would lie to vindicate a right to establish the mere dignity, unconnected to any fee or profit.

iv. Chasmere Vs. Richards:

A land owner dug a well in his own land, but this deprived a neighbour from using his water, which resulted in great loss to him. It was held that the plaintiff had no cause of action, and could not sue the defendant, because the defendant had exercised his legal right in his land.

v. Mayor of Bradford Corporation Vs. Pickles:

In this case, the House of Lords held that a lawful act does not become unlawful merely because of an evil motive.

Mr. Pickles, the defendant digged his own land. Due to this, the water flew in unknown and undefined channels from his land to the adjoining land of the Corporation and it

became discoloured. The motive of the defendant in doing the act was to coerce/force the Corporation to purchase his land at a higher price.

The House of Lords held that though the damage was caused maliciously, since the defendant was lawfully using his land, the defendant was not liable.

Further it observed that in these types of cases, motive is immaterial. It is only the act and not the motive for the act which must be considered.

vi. Acton Vs. Blandel:

The defendants dug a coal mine in his land. Because of this act of the defendant, the neighbouring plaintiff's well became dry. The Court held that the defendants were not liable, as they were exercising only their legal rights in their land.

2. INJURIA SINE DAMNUM:

It means, **'the violation of law without loss or damage'**. Here the legal right of a person is violated, though there is no loss or damage. So it is an actionable wrong. It is sufficient to show that there is violation of a legal right. Then the law will presume damage.

Thus, in cases of assault, battery, false imprisonment and trespass on land, the mere wrongful act is actionable even without proof of special damage.

Similarly, a libel (written defamation) is actionable, eventhough the person defamed may not actually have suffered the slightest harm.

i. Ashby Vs. White:

The defendant refused to register a qualified voter, i.e., the plaintiff. So, the plaintiff could not poll his vote in the election. However, his candidate was elected.

Though there was no loss or damage to the plaintiff, his legal right to poll his vote in the election was violated. So he sued election office for damages. The Court held that he could claim compensation, as his legal right to vote has been violated.

ii. Marzetli Vs. Williams:

A Banker refused to honour a customer's cheque. The customer had sufficient funds in his account. Even though customer did not sustain any loss or damage, the Court held that the customer was entitled to damages, by applying the principle of 'injuria sine damnum'.

iii. Bhim Singh Vs. State of Jammu and Kashmir:

The petitioner Bhim Singh, a sitting M.L.A. in Jammu and Kashmir Assembly, was illegally detained by the Police while he was proceeding to attend the State Assembly Session. The Supreme Court held that his legal right to attend the assembly was illegally prevented by the Police and hence the petitioner was entitled to get compensation from the State Government.

iv. Asharfilal v. Municipal Corporation of Agra:

This case is similar to the British case of Ashby v. White. Herein, a voter's name was dropped form the electoral list of local municipality elections due to which he was deprived from exercising his legal right to vote. Consequently, he claimed compensation from the Municipal Corporation of Agra for the violation of his legal right. The court citing Ashby v. White judgement, awarded nominal damages to the appellant.

v. Kali Kissen Tagore v. Jodoo Lal Mulick:

The Privy Council held that if a right of a person is interfered with, then 'injuria sine damnum' arises. This is a sufficient cause of action, even if there is no loss or damage to the person .

B. UBI JUS IBI REMEDIUM:

This maxim means - **'where there is a right, there is remedy'**. Whenever a right is violated, then the person having such right has a remedy against the person who has violated it. In other words, for every wrong, there is a remedy.

i. Ashby Vs. White:

The defendant refused to register a qualified voter, i.e., the plaintiff. So, the plaintiff could not poll his vote in the election. However, the candidate of the plaintiff's choice was elected. Hence, there was no loss or damage to the plaintiff, but still since his legal right to poll his vote in the election is violated, he could claim compensation.

The Court held that the violation of the plaintiff's statutory right to vote was an injury to him and hence there should be a remedy for such wrong.

If any person has a legal right, then he must have the means to establish, maintain, safeguard and be able to seek remedy in case of its violation by others. In other words, if a right has no remedy for its violation, then such right is of no use.

However, this maxim does not apply to moral or social rights. For e.g., if a person makes a promise to give a loan to another, then the other person has no right to enforce it because it is not a legal duty to the creditor to give loan.

ii. Sardar Amarjit Singh Kalra v. Promod Gupta & Ors.,

The Supreme Court held that the principle of ubi jus ibi remedium is recognized as a basic principle of law. The Court also held that it is the duty of the courts to protect and maintain the right of parties and help them to establish their rights.

iii. D.K. Basu v. State of West Bengal, Mr. D.K. Basu:

After hearing this case, the Supreme Court issued some guidelines which need to be followed during the arrest of an accused person.

The Court further said that a mere declaration of violence in police custody or judicial custody is a legal wrong and does not provide any remedy to the victim or family of

victim on the death of the victim. Only giving punishment to the victim is not sufficient.

To file a civil suit for compensation is a long process nd compensation should be provided to the person who sustained injury. Therfore, for custodial violence, the quantum of compensation should be immediately decided considering the circumstances of each case.

iii. Bhim Singh v. State of Jammu & Kashmir:

In ***Bhim Singh v. State of Jammu & Kashmir,*** the petitioner was MLA of Jammu and Kashmir parliamentary assembly. While he was on his way to attend the parliamentary session he was wrongfully arrested by a police officer and he was restrained from attending the parliamentary session.

He was not presented before the Magistrate in time and he had a legal right to attend the meeting. His fundamental right under Article 21 of the Constitution was also violated.

The Supreme Court held that this right of the petitioner is enforceable and also held that the respondents were responsible to pay Rs.50,000 as compensation to the petitioner for the infringement of his fundamental right.

iv. Maretti v. William:

In ***Maretti v. William,*** the defendant was the owner of the bank, and the plaintiff's fund was deposited in the

defendant's bank. The plaintiff had sufficient balance in his account in spite of that, the defendant refused to honour cheque to him.

The court held that the defendant is liable for the loss caused to the plaintiff. The maxim ubi jus ibi remedium was applied as the plaintiff's legal right was violated and defendants were liable to pay damages.

v. Shivkumar Chadha v. Municipal Corporation of Delhi:

In ***Shivkumar Chadha v. Municipal Corporation of Delhi,*** the Supreme court held that if statutory enactments do not provide any remedy, but only create rights and liabilities, and if any person complains of his rights being violated, such person can approach the civil court on the basis of the principle 'Where there is a right, there is a remedy'.

vi. C.Veera Thevar vs The Secretary to Government:

In the case of ***C.Veera Thevar vs The Secretary to Government,*** the court held that if there is a wrong, then there is a remedy. The law says that in every case where a person is wronged and caused injury, then remedy should be provided for that.

Mere declaration of death in lockup does not provide any remedy to a person whose fundamental right is violated. It is illegal. Remedy should be provided in the law itself.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *"All injuries done to another person are torts, unless there is some justification recognised by law" - Comment.*

2. *"Injuria sine damnum is actionable, but damnum sine injuria is not"- Explain the statement with reference to decided cases.*

3. *What is legal damage? Explain the same with the help of damnum sine injuria and injuria sine damnum.*

4. *Where there is a right, there is a remedy - Discuss.*

5. *Write short notes on: (a) Damnum sine injuria (b) Injuria sine damnum (c) Ubi jus ibi remedium (d) Legal damage*

GENERAL ELEMENTS IN TORTS

(MENTAL ELEMENTS-INTENTION, MOTIVE, MALICE IN LAW AND IN FACT)

(PHYSICAL AND MENTAL ELEMENTS IN TORTS)

In order to constitute a 'tort', an act or omission which infringes the plaintiff's legal right is necessary. Such act or omission is the physical element, but the state of mind of a person is the mental element like malice, intention, negligence, motive, malfeasance, misfeasance and non-feasance, fault, etc.,

The physical elements and mental elements are explained in the following **six** chapters -

A. **Act and Omission (Physical element)**

B. **Malice (Mental element)**

C. **Intention and Negligence (Mental element)**

D. **Motive (Mental element)**

E. **Malfeasance, Misfeasance and Non-feasance (Physical element)**

F. **Relevancy of fault in tort (Mental element)**

4. ACT AND OMISSION
(PHYSICAL ELEMENT)

(SHORT NOTE)

In order to constitute a tort, there must be a wrongful act. The word 'act' here means, both positive and negative acts, i.e., acts and omissions.

The defendant must have done an act, which he should not have done it, or he must have omitted to do an act which he has the duty to do to the plaintiff .

The plaintiff gets a right of action, if any act or omission of the defendant affects any of the following rights of the plaintiff namely right of reputation, right of personal freedom, right to bodily safety, etc.

Thus, the wrongful act or omission must result in breach of legal duty owed to the plaintiff.

There is no liability in tort for breach of moral or social obligation, i.e. not giving money to a beggar, not saving a drowning man, not attending a friend's wedding, etc.,

5. MALICE (MENTAL ELEMENT)

(IMPORTANT)

SYNOPSIS:

A. Definition - Malice

B. Kinds of Malice

1. Malice in Law 2. Malice in fact

C. Exceptions to the rule of irrelevancy of Malice (motive) in Law of Torts

A. DEFINITION - MALICE:

Malice means a wrongful act, done intentionally without any just cause or excuse. It is a wrongful act, done knowingly and with the knowledge of its injurious consequences.

B. KINDS OF MALICE:

Malice is of **two** kinds -

1. Malice in Law 2. Malice in fact

1. MALICE IN LAW:

In legal sense, malice in law means a wilful act done without just cause or excuse. It signifies a wrongful act done intentionally without just cause or excuse.

Malice is either express or implied. If an act is done intentionally to cause harm to another, it is express malice. If malice is inferred from the wrongful act of a person, it is implied malice.

The wrongful intention in malice is presumed by the Court in every unlawful act. For e.g., in defamation, if the statement published is false and made without any legal justification, then it is presumed that such statement has been published maliciously and the defendant has the burden of proof to disprove the same.

2. MALICE IN FACT (EVIL MOTIVE):

Malice in fact, in narrow sense - means an evil motive. When the defendant does a wrongful act with a feeling of spite, vengeance or ill-will, then the act is said to be done 'maliciously'. It is also called **'Evil Motive'**.

Motive means an ulterior reason for committing an act. It is different from intention, which relates to the wrongful act itself. For e.g.: A commits theft of some biscuits to satisfy his hunger. Here the motive is for a good purpose of satisfying his hunger but his immediate act of theft is with evil intention.

In tort, motive is immaterial. In other words, motive is not relevant to decide a person's liability in law of torts. A wrongful act does not become lawful, merely because it

was committed with the good motive. Similarly, a lawful act does not become wrongful, because it was committed with an evil motive or malice.

i. South Wales Miners' Federation Vs. Glamorgan Coal Company:

The plaintiffs were the owners of a coal mine. The mines workers' union instructed their members to avail leave for certain period.

It was done with a good motive that the over production of coal over and above the actual requirement of the public may drastically reduce its price rate, which in turn, would affect the coal price and the workers' wages in turn.

The plaintiff company brought an action against the union for compensation for loss in production. The House of Lords held that the union was liable to compensate the plaintiff company, as 'motive' - whether evil or good is irrelevant in law of torts.

ii. Bradford Corporation Vs. Pickles:

In this case, the House of Lords held that a lawful act does not become unlawful merely because of an evil motive.

Mr. Pickles, the defendant digged his own land. Due to this, the water flew in unknown and undefined channels from his land to the adjoining land of the Corporation and it became discoloured.

The motive of the defendant in doing the act was to coerce/force the Corporation to purchase his land at a high price.

The House of Lords, held that though the damage was caused maliciously with evil motive, the defendant's act was lawful use of his land and hence, the defendant was not liable.

Further it observed that in these types of cases, motive is immaterial. It is only the act and not the motive for the act must be considered and if the act is legally justified, there is no cause of action under law of tort.

iii. Town Area Committee Vs. Prabhu Dayal:

Prabhu Dayal constructed shops without complying with the provisions of U.P. Municipalities Act.

The Town area Committee demolished the shops. Prabhu Dayal contented that some of the officers of the Town Area Committee had acted maliciously with an evil motive and hence ordered for the demolition of his shops.

The Court held that the demolition of an illegal construction was lawful under the Act. It further held that it is irrelevant whether the demolition was done maliciously (evil motive) or not.

C. EXCEPTIONS TO THE RULE OF IRRELEVANCY OF MALICE (MOTIVE) IN LAW OF TORTS:

Though malice/ill motive is irrelevant in law of torts, in certain exceptional cases, the malice is considered as relevant in determining the liability of the defendant.

1. When the act committed is unlawful, then the wrongful intention of the tort feasor is looked into.

Balak Glass Emporium Vs. United India Insurance Co. Ltd.,:

In a multi-storeyed building the upper floor was occupied by the defendant and the lower floor was occupied by the plaintiff. There was evidence of prior ill-will between the plaintiff and the defendant.

The defendant kept his water tap fully opened and also closed the outlet of the water tank. So, the water overflowed to the lower floor and damaged the plaintiff's house, articles, etc., The Court held that the plaintiff was entitled to compensation as the act of the defendant was malicious with ill motive.

2. Malice is an essential element in the tort of deceit, conspiracy, malicious prosecution, etc., and the presence of malice (ill motive) has to be proved by the plaintiff to get compensation from the defendant.

3. Good motive becomes relevant in 'defences to defamation' like qualified privilege, fair comment, etc.,

4. When personal discomfort is caused to a person, the motive behind causing such personal discomfort is looked into. If it is by ill motive, then it amounts to the tort of nuisance.

5. While determining the quantum of compensation payable to the plaintiff in tort, the motive of the defendant is taken into consideration.

   If it is of good motive, the compensation payable by the defendant gets reduced or the defendant need not pay any damages, but if it is of evil motive (malice), then the compensation payable by the defendant gets enhanced.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the term malice, malice in law and malice in fact citing case laws.*
2. *Explain malice as a mental element in tortious liability.*
3. *Write short note on: Malice*

6. INTENTION AND NEGLIGENCE
(MENTAL ELEMENT)

(SHORT NOTES)

INTENTION:

Intention is a desire to bring about a certain result. An act is intentional, if the person has the knowledge of its consequences and also desires that it should result.

Liability in tort arises from a wrongful act.

NEGLIGENCE:

Negligence is a failure to exercise the amount of care as a reasonable prudent man would usually exercise.

(Also please refer
Chapter No. 28, Page No. 126)

7. MOTIVE (MENTAL ELEMENT)

SYNOPSIS:

A. *Motive and Intention*

B. *Motive - not relevant in Tortious Liability*

C. *Motive relevant in Tortious Liability*

A. MOTIVE AND INTENTION:

Motive is the ulterior purpose of doing an act. Intention is the immediate objective of an act whereas motive is the ulterior objective. Motive refers to personal benefit with which the person doing desires, but intention may not be so. E.g.: A poisons B. His intention may be to kill B. His objective is to get B's property. This is his motive.

B. MOTIVE - NOT RELEVANT IN TORTIOUS LIABILITY:

Motive is generally not relevant in determining the liability in tort. But in torts like malicious prosecution, malicious abuse of process, malicious falsehood, defamation, nuisance and conspiracy, 'motive' is relevant.

In some cases, there may be more than one purpose. In such cases, the dominant purpose should be decided. For e.g.: If the purpose of certain persons is to protect their own interests and to damage another person, they are liable for the tort of conspiracy, if their predominant purpose is to cause damage and damage actually results.

However, if the predominant purpose is to protect their legitimate interests, then they are not liable even if damage is caused to the plaintiff. ***(Gofter Hand woven Harris Tweed Co., Vs. Veitch)***

C. MOTIVE RELEVANT IN TORTIOUS LIABILITY:

The following **two** rules must be taken into consideration regarding motive:

1. Eventhough motive may be good, a wrongful act does not become lawful.

   South Wales Minor's Federation Vs. Glamorgan Coal Co.,:

(Please refer Page No. 36)

2. Bad motive does not make a lawful act wrongful.

   Town Area Committee Vs. Prabhu Dayal:

(Please refer Page No. 37)

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Motive is irrelevant in law of tort - analyze this statement.*
2. *Motive is the ulterior purpose of doing an act - Comment.*
3. *Explain the relevancy of motive in law of tort.*
4. *Write short note on: Motive*

8. MALFEASANCE, MISFEASANCE AND NON-FEASANCE (PHYSICAL ELEMENT)

(SHORT NOTES)

1. MALFEASANCE:

It is a commission of an unlawful act and it is *actionable per se* i.e., does not require any proof of intention or motive. For e.g.: The tort of trespass is an act of malfeasance i.e., committing a wrongful act. Here, it is actionable per se i.e., without proof of loss and/or motive or intention.

2. MISFEASANCE:

It is improper performance of some lawful act. For e.g.: In negligence, when a person fails to exercise the required care and caution, he commits misfeasance.

Illustration:

A, a ticket checker in a railway company, demands production of ticket from a passenger for verification. The passenger cannot produce it. The ticket checker, instead of levying fine, pushes the passenger out of the train and in the process, the passenger gets hurt. Here, A has committed misfeasance.

(Also please refer Negligence, Chapter No. 28, Page No. 126)

3. NON-FEASANCE:

It is omission to perform some act, when there is an obligation to perform it.

For e.g.: As an occupier of a premises, he is duty bound to keep all the places in the house in safe condition to the licensed visitors like relatives and others. If he fails to keep so or fails to inform the places of non safety to the visitors, then he commits non feasance.

The principle of non feasance is applicable to all places of public access as a matter of right - like railway platform, petrol bunks, temples, super markets, cinema halls, etc.,

9. FAULT IN TORT (MENTAL ELEMENT)

(MOST IMPORTANT)

SYNOPSIS:

A. Definition

B. Fault - relevant in Tortious Liability

C. Fault - irrelevant in Tortious Liability

D. No liability with fault

E. Liability without fault

F. Objective behind irrelevancy of fault

A. DEFINITION:

The term 'fault' means and includes intentional act of commission or intentional act of omission.

B. FAULT - RELEVANT IN TORTIOUS LIABILITY:

According to Sir John Salmond, the liability in tort should always be based on fault. A person is liable for a wrongful act only if he has done it either intentionally or with culpable negligence.

It means for intentional or accidental injuries, a person should not be made liable. The payment of compensation by the tort feasor is an indirect form of punishment to him.

C. FAULT - IRRELEVANT IN TORTIOUS LIABILITY:

The critics of Salmond does not agree with his view. According to them, fault is totally irrelevant in law of torts. There can be no liability even when there is fault on the part of the tort feasor. Similarly, there can be liability even when there is no fault on the part of the tort feasor (Strict liability).

The following illustrations will help to understand the above rule that fault is not relevant in law of torts.

D. NO LIABILITY WITH FAULT:

1. In many civil wrongs in law of torts - like **assault, battery, false imprisonment, deceit, malicious prosecution and conspiracy**, the state of mind of a person (i.e., mens rea) is relevant to ascertain the liability of the tort feasor.

   In such cases, the conduct of the defendant is compared with that of a reasonable prudent man and if his conduct falls below the standard expected of a reasonable man, then he is made liable.

   For e.g.: If a person has to exercise a minimum degree of care in a particular circumstance, and if he fails to exercise care, then he is liable for the tort of negligence. However, if the has taken sufficient care, then he is not liable.

2. Similarly, if the conduct of a person is innocent in an **inevitable accident**, then he is not liable. In the same way, if a person has caused injuries in the **defence of necessity**, then he is not liable.

i. If **'two alternative dangers' (inevitable accident)** are simultaneously present, then in order to prevent a greater evil, if a person causes a smaller injury, then he is not liable.

ii. Similarly, a person can commit trespass under **necessity** to prevent the spread of fire to the adjoining lands.

iii. In the same way, for injuries sustained by the plaintiff when he was pulled out while drowning in the well **(saving persons in danger)**, the defendant is not liable for any tort.

E. LIABILITY WITHOUT FAULT:

In certain cases, even if there is no fault, the liability arises to the defendant.

Here, the mental element is quite irrelevant and the liability arises even without any wrongful intention or negligence on the part of the defendant. In these cases, innocence of the defendant and/or an honest mistake on his part are of no defence.

The following are the illustrations -

1. **Agency:** An agent, who sells goods, on behalf of the principal, and under his authority, is liable for conversion, even though at the time of sale, he honestly believed that the principal was the true owner.

2. **Defamation:** In the case of defamation, if the defendant's act was defamatory, even though he did not intend to defame the plaintiff, he is liable.

3. **Vicarious liability:** In case of vicarious liability, the master is held liable for the wrongs of his servant, though he himself was not at fault.

4. **Strict/absolute liability:** In ***Rylands Vs. Fletcher case*** - if a person makes non-natural use of his land by collecting therein something which is likely to do mischief by its escape, then he is liable if the thing so collected escapes and causes damage.

   In such a case, it would be no defence to say that defendant was not negligent in collecting the thing or for its escape.

5. **Dangerous animals:** There is absolute liability when a person knowing the dangerous nature of an animal keeps it and if the animal causes any injury to any person, then the owner of the animal is liable.

6. **Hazardous industries:** In the case of hazardous and inherently dangerous industries, the principle of absolute liability is recognised and the owner/occupier

is liable for any injury sustained by the worker/ outsider, eventhough there is no negligence on the part of the owner/occupier.

7. **Fatal Accident Act 1855** makes the tort feasor (wrong doer) absolutely liable for the death/injuries sustained by the accidental victims irrespective of the fact whether the defendant is negligent or not. In other words, even if the defendant is not at fault, still he is liable to pay compensation to the plaintiff under the Fatal accident Act.

8. **Workmen's Compensation Act 1923** - the employer is liable to pay compensation to the workman for all accidents arising **'in the course of and out of the employment'** of the workman irrespective of the fact whether the workman and/or the employer was negligent or not.

In other words, even if the employer is not at fault, still he is to pay compensation to the work n under the Workmen's Compensation Act.

F. OBJECTIVE BEHIND IRRELEVANCY OF FAULT:

1. The reason/objective behind these enactments is to shift the liability to those persons who can bear it.

Thus all the recent legislative enactments and judicial decisions show that the criteria of liability in tort is not much on culpability (mental intention of the tort feasor), **but on the person who can bear the risk (occupier/owner/employer).**

2. Now a days, the tort feasors/ employers cover the road/ industrial risks by taking insurance policies, thereby getting indemnity from the insurers for all their liabilities. In other words, the loss is distributed through insurance to the public.

3. The Motor Vehicles Act, 1988 provides for a fixed amount of compensation under **'no fault liability'** in case of death or permanent disability of the accidental victim, even if the driver or the owner of the vehicle is not at fault.

   In these cases, even contributory negligence on the part of the accidental victim is of no defence to the plaintiff, though it may, at the most, reduce the quantum of compensation.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain how far 'fault' is relevant in law of torts.*
2. *'In tort there can be no liability even when there is fault and there can be liability even when there is no fault' - Discuss the correctness of statement.*
3. *'Fault has never been and is not today an essential element in tortious liability' - critically examine this statement.*
4. *'Recent legislative and judicial development show that the criterion of liability in tort is not so much culpability but on whom should the risk fall'. Illustrate and explain.*
5. *Write short note on: Relevancy of fault in law of torts.*

10. FOUNDATION OF TORTIOUS LIABILITY

(SALMOND'S 'LAW OF TORTS' - NARROWER THEORY AND FREDRIC POLLOCK'S 'LAW OF TORT' - WIDER THEORY)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. Sir John Salmond's theory of 'Law of Torts' - Narrower Theory

C. Sir Fredric Pollock's theory of 'Law of Tort' - Wider Theory

D. Conclusion

A. INTRODUCTION:

As regards the general principle of tortious liability - there are **two competing theories** - one profounded by **Sir John Salmond** and the other profounded by **Sir Fredric Pollock and Dr. Winfield**.

B. SIR JOHN SALMOND'S THEORY OF 'LAW OF TORTS' - (NARROWER THEORY):

According to this theory, in England, in the beginning, there was no general law of tort, **but only law of torts** i.e., only for certain specific acts and omissions by the defendant, the plaintiff can bring an action against the defendant.

In other words, the civil wrongs/torts are all defined and if any wrong committed by the defendant does not fit in any of the specified wrongs/torts, then the plaintiff cannot have any legal recourse against the defendant under the law of torts.

In the words of the founder of this theory - Sir John Salmond 'just as the criminal law consists of a body of rules establishing specific offences, the law of torts also consists of a body of rules establishing specific injuries/wrongs'.

There can be no other civil wrong than the already existing specific wrongs. In other words, there are a number of torts outside which liability in tort does not exist. Thus in both Crimes and Torts, there can only be specific liability and there cannot be any general principle of liability.

C. SIR FREDRIC POLLOCK'S THEORY OF 'LAW OF TORT' (WIDER THEORY):

According to Sir Fredric Pollock, if any wrongful act is committed without legal justification and if it causes harm to any person, then it must be treated as a tort.

In other words, the law of tort is wide and it is not confined only to certain specific acts and omissions by the defendant, for which alone, the plaintiff can bring an action against the defendant.

Even historically, the tort began only through one specific tort namely trespass, which came into existence

through the civil law of 'writ' of trespass.After that, many torts like libel, slander, false imprisonment, defamation, etc., came into existence.

Even the tort of malicious prosecution and deceit (fraud) have now undergone a lot of changes in scope, application, etc., The tort of deceit has now become wider because of the invention of new forms of deceit. After the separation of law of tort from the law of contract, the law of tort became an independent branch of law. In the 19th century, many new types of torts came into existence.

The tort of negligence came into existence during the beginning of 19th century as an independent tort and now this tort has become very advanced with the advent of new doctrines like res ipso loquitor, doctrine of alternative dangers, last opportunity rule, doctrine of identification, contributory negligence, composite negligence, etc.,

The rule of strict liability was established as a tort in 1868 in the leading case ***Ryland Vs. Fletcher***. In 1964 deceit was recognised as an independent tort in the case - ***Rooks Vs. Bernard.*** In 1979, the tort of 'passing off' became wider in scope and now it includes copyright, patent right, trade marks, confidential information, etc.,

The above examples and illustrations clearly vindicate that the law of tort is a continuously growing law and ever expanding one. So Salmond's view that the law of tort is confined only to a set of pigeon holes is not correct and his approach is conservative and not a practical one.

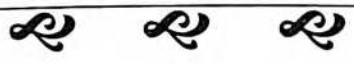
In ***Ashby Vs. White***, his Lordship Holt, J, has rightly observed that when men multiply, injuries, actions also must naturally multiply. So under the law of tort, every man who is injured by any wrongful act without legal justification must be compensated and such remedy should not be confined only to specified set of rules that constitutes law of torts.

D. CONCLUSION:

To conclude, in between the above two theories, the second theory by Sir Fredric Pollock is nowadays most accepted theory as it is pragmatic and progressive. The ultimate test whether a civil wrong is a tort or not is to find out whether it comes under the general principles of liability in the law of tort or not.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *'Number of torts are specific/definite beyond which liability in tort does not arise' - Salmond. Discuss.*
2. *Explain the two theories regarding the principles on which the tortious liability is founded.*
3. *Explain Salmond's theory of 'law of torts' and not 'law of tort' with special reference to the theories of foundation of tortious liability.*
4. *All injurious acts which cause harm to other persons are torts, unless there is any legal justification for it - Sir Fredric Pollock. Comment.*
5. *Discuss the theories about the principles on which the foundation of tortious liability rests.*
6. *Discuss the principles of tortious liability.*



11. CAPACITY TO SUE AND BE SUED
(WHO CAN SUE AND CANNOT SUE AND WHO CAN BE SUED AND CANNOT BE SUED)

(MOST IMPORTANT)

SYNOPSIS:

A. ***Act of State***
B. ***Convict***
C. ***Alien Enemy***
D. ***Husband and wife (Married Women)***
E. ***Corporation***
F. ***Unincorporated Associations***
G. ***Trade Union***
H. ***Insolvent***
I. ***The State and its Officers***
J. ***Foreign Sovereign***
K. ***Ambassadors***
L. ***Minor***
M. ***Child in the Womb***
N. ***Lunatic***

Generally all persons can sue and be sued, but this rule is subject to modifications in case of certain persons as given below:

A. ACT OF STATE:

An act done in exercise of sovereign power in relation to another State or subjects of another State is an 'Act of State' and hence cannot be questioned by Municipal Courts. Act of State means an act of the executive as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of that State.

Buron Vs. Denman:

Denman, a captain in the British Navy, released slaves and burnt the slave barracoons owned by Buron. Denman had no authority to do so, but his act was ratified by the British Government. It was held to be an Act of State for which no action could lie.

B. CONVICT:

Previously, in English Law, a convict who was serving a sentence cannot sue for any injury to his property or for recovery of a debt. But after the Criminal Justice Act, 1948, this incapacity has been removed and now, he can sue for the wrongs to his person and his property like any other citizen. In Indian law, the same position exists. The Indian Constitution even guarantees other freedoms like the right to acquire, hold and dispose of property.

C. ALIEN ENEMY:

An alien is a person living in an enemy country, whatever be his nationality (***Scotland Vs. South African Territory***).

In English Law and Indian Law, the law relating to alien enemy is the same. An alien enemy cannot sue or be sued for tort in an Indian Court. But, if he is residing in India, with the Central Government's permission, he may sue or be sued, according to Sec. 83 of Code of Civil Procedure 1908.

D. HUSBAND AND WIFE (MARRIED WOMEN):

In England, a married spouse could not sue each other for torts. A married woman could sue third parties only, if her husband joined her as a co-plaintiff. Both husband and wife were considered as one single person. She could be sued, only if her husband was made a co-defendant.

But after passing of the Married Women's Property Act 1882 and Law Reform (Husband and Wife) Act 1962, both the husband and wife have same right of action in tort against the other.

In India, the marital status of Hindus, Sikhs, Jains, Buddhists and Muslims are governed by their personal laws, which do not affect the capacity of the parties for suing or for being sued.

Thus, the legal position of married spouses is that the spouses can sue each other and be sued by third parties. The wife can also now sue any third party and be sued by third party without her husband being joined her as plaintiff or defendant.

A claim in respect of injury caused by her husband to her before her marriage being 'chose in action', she could sue her husband for the same after her marriage. As a wife could sue only for the protection and security of her property, she could not sue her husband if he has caused her any personal injuries.

Thus, if the husband damages her watch, then she can sue him for the same, but if he negligently fractures her legs, then she cannot bring any action for that. The husband had no right at all for an action for any kind of harm caused by his wife to him.

If the husband, while acting as an agent or servant for some third party, commits a tort causing an injury to his wife, then the wife can sue the third party. She is not debarred from bringing an action against the third party, merely because her husband was not liable for such injury. Thus, where a husband while driving a car as an agent of his mother injures his wife, the wife can sue her mother-in-law alone.

E. CORPORATION:

A Corporation is a legal person and not a natural person. It is created by an Act of the legislature.

For e.g.: State Bank of India, Reserve Bank of India, Universities, etc., The Corporation/Company may also be registered under the Companies Act, 1956. The Corporation has a distinct name and seal, independent

corporate personality, perpetual in existence and capacity to sue and be sued.

However, a Corporation cannot sue for torts like assault, battery, false imprisonment etc, which are wrongs against persons. It can sue for torts like malicious prosecution, defamation, trespass, etc.,

1. A Corporation is liable for a tort committed by its agents or servants (vicarious liability) committed in the course of employment.

Citizens Life Assurance Co. Vs. Brown:

A circular against an ex-employee of the Company was sent to the policyholders by the Superintendent of the Company. As he had done it in the course of employment, the Company was held for the tort of defamation. Thus, even for the torts like malicious prosecution and fraudulent misrepresentation committed by the agent on behalf of the Corporation, the Corporation can be held liable.

2. Corporation can be sued for the torts committed by its agents or servants outside the authority (ultra vires) or employment.

Campbell Vs. Paddington Corporation:

The Paddington Corporation, in furtherance of a resolution of their council, erected a stand on a highway to enable the members of the council and their friends to view

the funeral procession of Edward VII. The construction was of such a big structure on the highway that it caused public nuisance.

It obstructed the view of the main road from the plaintiff's house and hence she could not enter into profitable contracts by charging for seats in her house for viewing the said profession. She filed a suit claiming compensation for private nuisance as the same had interfered with the enjoyment and use of her house resulting in special damage to her.

The Corporation contended that the council's resolution was an ultra vires act and hence the Corporation could not be made liable for such an act.

The Court rejected this plea and held that the Corporation was liable. It held that for the purpose of liability of the Corporation for torts, there is no need to draw distinction between intra vires and ultra vires torts, because a Corporation is equally liable for ultra vires acts done by its representatives/employees as of their intra vires acts.

F. UNINCORPORATED ASSOCIATIONS:

As unincorporated associations are not legal persons and do not have corporate existence, they cannot sue and be sued in their name. Any member of such association may be sued personally for torts authorised or committed by him. A partnership firm can sue and be sued in the firm's name.

G. TRADE UNION:

In Indian law, every registered Trade Union is a corporate body. It cannot be sued for any tort committed by in the course of trade dispute for conspiracy, etc.,

In English law, a Trade Union is a legal entity, though it is not a corporate body. It could be sued in tort for the wrongful acts of its officers for defamation, if it affects the reputation of the business of the company. ***(Metropolitans Saloon Omnibus Vs. Hawkins)***

H. INSOLVENT:

An insolvent is a person who is not able to repay his debts and who is a bankrupt. His property is usually in the hands of the Official Receiver or Assignee, appointed by the Court. An insolvent can sue for any tort to personal reputation or feelings of an insolvent.

But if a tort is committed against the property of an insolvent, the Official Receiver or Assignee can only have the right of action. An insolvent may be sued before insolvency or during insolvency and if a decree is obtained against him, the amount awarded is a debt provable in insolvency.

I. THE STATE AND ITS OFFICERS:

According to English law, previously the Sovereign was not liable for any tort, as it was considered that the "King can do no Wrong". The King was thus not answerable to his people for his wrongs. The Crown Proceeding Act 1947

was passed which changed this position. The Crown is vicariously liable for the torts committed by his servants in the course of their employment, if committed in circumstances which would render a private employer liable (Non-sovereign acts of the Government officials).

According to Indian law, the maxim ***"King can do wrong"*** was never applied in India. Action will not lie for torts committed by public servants in discharge of statutory functions based on 'Sovereign Functions' of the State. But if Tort is committed by a public servant in discharge of non-sovereign function, action will lie.

According to the Indian Constitution, the President and Governors of States are not answerable to any Court for performance of powers and duties of their offices and for any act done by them in the exercise of those powers and duties.

Public officials cannot be sued in their representative capacity for the torts committed by them or by their subordinates. They can be sued in their private capacity for torts committed by them on behalf of or with the authority of the Crown or Government.

As there is no master and servant relationship between the public officials and their subordinates, they cannot be held liable for the torts of the subordinates, unless expressly authorised or ratified by them. Both the public officials and the subordinates are servants of the Crown.

J. FOREIGN SOVEREIGN:

Unless a foreign Sovereign submits to the Indian Court's jurisdiction voluntarily, he is not liable for any tort committed by him. The consent of the Central Government is necessary in order to sue a foreign Sovereign or ruler. But a foreign Sovereign can sue in an Indian Court to enforce a private right if his State has been recognised by the Central Government.

K. AMBASSADORS:

The foreign Ambassadors, their family members and their servants cannot be sued for torts except with the consent of the Central Government. But an Ambassador can voluntarily submit himself to the Court's jurisdiction.

L. MINOR:

When a guardian is appointed under the Guardians and Wards Act, 1890 or when a guardian is appointed for supervision of minor's property under the Court of Wards, then the age of majority of a minor is 21 years.

Under Indian Penal Code, an infant below 7 years is not liable for any crime and a child between 7 and 12 years is not liable unless he/she had sufficient maturity to judge the nature and consequence of his/her conduct on the given occasion.

Under Indian Contract Act, a contract by or with a minor is ***void ab initio***. However, under Law of Torts, there is no such provision for minors. So a minor has no special

protection in a suit under the law of torts and he is liable like any other adult member for his tortious acts. Thus, **infants are held liable** for assault, false imprisonment, libel, slander, seduction, trespass, wrongful detention of goods, fraud, nuisance, etc.

Generally a parent or guardian is not responsible for the torts of the child. However, a parent may be held liable as in the relationship between master and servant, for the child's acts. For e.g., if the father is negligent in allowing a son to do a wrong, then he is liable to pay compensation on minor's behalf.

Minor's capacity to sue:

A minor has a right to sue like an adult. However, he cannot himself sue but only through his next friend.

M. CHILD IN THE WOMB/ PRE-NATAL INJURIES (RIGHTS OF UNBORN CHILD):

A minor can sue for pre-natal injuries. Pre-natal injuries means injury sustained by the child when it was in the mother's womb before its delivery by the mother.

i. Walker Vs. G.N. Ry. Co., of Ireland:

The plaintiff, a child - immediately after birth, sued the defendant railway company through his guardian mother for damages (compensation) on the ground that when his pregnant mother travelled in the defendant's railway, because of the negligence of the railway authorities, he (the child) was born crippled and deformed.

The House of Lords held that the defendant railway company were not liable, because they did not owe any duty to the plaintiff child as they did not know about his existence and that there was not sufficient medical evidence to prove the child's claim.

ii. Montreal Tramways Vs. Leveille:

A pregnant mother sustained injuries to self and to the child in the womb due to the negligence of the defendant Tramway Company. The child was born with feet - bent and curved. The Supreme Court of Canada held that since the act of the defendant was tortious, the defendant Tramway company was liable to pay compensation for pre-natal injuries of the child.

Based on the above case laws, the English Parliament enacted **'The Injuries to Unborn Children Act' - 1974 and 'The Congenital Disabilities (Civil Liability) Act' - 1976.**

As per the provisions of the Act, a disabled child can bring a action against the tort feasor for pre-natal injuries. The child can claim damages for the loss of expectation of life, if the child has lived atleast 48 hours after it is birth.

Contributory negligence on the part of the child's mother is a defence to the defendant. The claim on the child may be compromised with the child's mother. If the injuries to the child is due to the mothers negligence, then the child can bring an action for injury even against its own mother. In India, there is no such similar legislation.

N. LUNATIC:

Though insanity is a good defence in the criminal law, it is not so in the case of torts, as the object of torts is only compensation and not punishment. A lunatic is not liable for torts in which mental condition or mind forms an essential condition.

Only if the lunatic cannot understand the nature and consequences of his act, he is not liable. Thus, only for torts where mental intention like malice, etc., is required, a lunatic is not liable.

Morris Vs. Marsden:

Morries was assaulted by a lunatic called Marsden. It was proved that Marsden knew the nature and quality of his tortuous act and hence he was held liable for damages.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss the capacity of (a) Convict (b) Husband and wife (c) Lunatics (d) Corporation, to sue and liability to be sued in the law of Torts.*
2. *Explain the rights of a child to sue for the pre-natal injuries sustained by him/her.*
3. *Explain the rights to sue and be sued of various persons in law of torts.*

12. FOREIGN TORTS

(SHORT NOTE)

A 'foreign tort' is a tort committed in a foreign country. The act complained of as wrong should have taken place outside the State in which the action is brought. The tort may be to person or movable property but not trespass to land.

Under the following conditions, the torts committed abroad may be tried in Indian Courts:

a. The act must be a tort in India.

b. The act must not be justified in the country in which it is committed, i.e., it must also be a tort in the foreign country where the act was committed.

PRINCIPLES REGARDING LIABILITY:

1. If the defendant's conduct is a tort in a foreign State (in which it was committed) but not so according to the State in which the action was brought, no action shall lie.

2. If the defendant's conduct is not tort where it has been committed, but is a tort in the Mother State, no action would lie.

3. If the defendant's conduct is a tort in the foreign State in which it was committed and also in the State to which action has been brought, then action would lie.

4. If the act is committed aboard the ship on high seas, the law of the country whose flag the ship is flying determines whether the act is tortious or not.

5. If an act is committed in an aircraft, then the same principles, as stated above, shall apply.

i. Phillips Vs. Eyre:

A suit for assault and false imprisonment against the Ex-Governor of Jamaica was brought. The wrongs were committed in the island during a rebellion. As his act was cured by the Act passed by the Jamaica legislature, the plaintiffs could not recover damages.

ii. Boys Vs. Chaplin:

Due to the defendant's negligence, an accident occurred in Malta by which the plaintiff was injured. Both the plaintiff and the defendant were British and in an action for damages, according to Malta's Law, compensation did not include pain, suffering and loss of amenities, but only expenses and the money loss. It was held that the compensation should be paid as per English Law.

iii. Halleys Case:

A British Steamer ship, due to the negligence of a Belgium pilot, collided with a Norweigian vessel in Belgium Inland waters. Under the Belgium law, the Britisher was liable, but under the English Law it was not a tort. The Court held that there could be no action against the British steamer in England.

UNIT-II

GENERAL DEFENCES

The defendant is generally liable to pay damages to the plaintiff for the tort committed by him (defendant), if the plaintiff is able to prove that the wrong committed by the defendant comes well within the essentials and scope of any of the torts. However, the defendant can avoid his liability by taking the plea of some defences.

The following are some of the specific defences' available to the defendant:

In other words, the defendant can raise the following defences in a tort:

A. VOLENTI NON FIT INJURIA (IMPLIED CONSENT TO FACE A RISK)

B. INEVITABLE ACCIDENT

C. ACT OF GOD (VIS MAJOR)

D. NECESSITY

E. MISTAKE

F. PRIVATE DEFENCE

G. PLAINTIFF - THE WRONGDOER

(EX TURPI CAUSA NON ORITUR ACTIO)

H. STATUTORY AUTHORITY

13. VOLENTI NON FIT INJURIA
(IMPLIED CONSENT TO FACE A RISK)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. Essentials of volenti non fit injuria

C. Consent obtained by fraud

A. INTRODUCTION:

Volenti non fit injuria means 'where there is consent, there is no injury'. An act is not actionable as a tort at the instance of any person who has expressly or impliedly consented to it. The principle is based on 'justice and good conscience'.

This maxim has **double** application.

In the first place, it applies to intentional acts which would otherwise be tortious. In the second place, it applies to cases of consent to run the risk of accidental harm, which would otherwise be actionable due to the negligence of the person, who caused the accident.

Hall Vs. Brooklands Auto Racing Club:

Hall was a spectator in a car race. Two cars collided and Hall was injured in the collision. In an action for damages, since he had given implied consent to run the risk, he was not entitled to recover damages.

Examples:

1. A patient who has voluntarily entered a nursing home for an operation cannot sue the Doctor for false imprisonment.

2. A player in the games of Hockey, Cricket or Football cannot complain if he gets hurt during the game, provided the rules of the game are scrupulously followed.

3. Spectators in 'sports events' cannot complain if they are hit by balls flying out of the flying area.

The maxim is ***'Volenti non fit injuria'*** (i.e., implied consent to face the risk) and not ***'Scienti non fit injuria'*** (i.e., implied knowledge to face the risk) The maxim is applicable only when there is express or implied consent to run the risk.

Mere knowledge of the risk is not sufficient to constitute the consent. The person injured must have knowledge of the risk and also must voluntarily undertake and agree to face the risk.

Smith Vs. Charles Bakers & Sons:

Baker & Sons appointed Smith for cutting stone rocks. The stones were conveyed from one end of the quarry to the other end, by cranes. Smith and Bakers knew that there was chance of the stones falling down. Smith was injured by the fall of a stone.

The Court held that Smith could claim damages, as he had only knowledge of the risk, but he has not given either implied or express consent to face the risk. Here, the maxim 'volenti non fit injuria' and not 'scienti non fit injuria' is applicable.

B. ESSENTIALS OF VOLENTI NON FIT INJURIA:

1. There must be an express or implied consent to face the risk. The consent must be free. If the consent of the plaintiff is obtained by fraud, compulsion, or mistake induced by the defendant, then it is not consent and it does not act as a defence also. Since a minor cannot give valid consent, the doctrine is **not applicable to minors.**

2. The injury or loss must not be caused by the wilful intention of the defendant.

3. The defendant should not be negligent. If he is negligent, this doctrine is not applicable. E.g.: ***Dann Vs. Hamilton.***

4. This doctrine is **not applicable to illegal acts.** E.g.: Illegal gunfight, sword fight, etc.

5. This maxim is **not applicable to 'rescue cases' or cases** of 'saving persons in danger'.

i. Brandon Vs. Osborne:

The plaintiff and her husband were making purchases in front of a shop. The plaintiff noticed the fall of a sky light from the roof. She pulled her husband and in doing so, she

sustained muscular injury. She brought an action against the defendant, namely the shop-keeper for compensation.

The defendant contended that the plaintiff had given consent to face the risk by her act of pulling her husband and hence the maxim 'volenti non fit injuria' is applicable and compensation is not payable.

However, the Court held that the maxim is not applicable to cases of negligence, and hence the plaintiff can get compensation. It further said that the maxim is not applicable to cases of saving persons in danger.

ii. Dann Vs. Hamilton:

The plaintiff offered to travel in a taxi. The driver was one Mr. Hamilton, who was drunk. Eventhough he was drunk, he had the capacity to exercise care.

Due to the negligence of the driver, the taxi met with an accident, the driver was killed and the plaintiff was injured. The plaintiff sued the taxi driver's wife for compensation for the injury sustained by her.

The taxi driver's wife contented that the plaintiff has consented to face the risk, as she had the knowledge that the driver is drunk. She invoked the doctrine of 'Volenti non fit injuria'. But the Court held that the plaintiff had not consented to the carelessness of the driver and moreover, the doctrine is not applicable to rescue cases. The plaintiff could recover damages.

iii. Cutler Vs. United Dairies:

The plaintiff himself went to assist the driver of a horse, which ran into a field. The horse threw him to the ground when he tried to hold it.

The plaintiff sued the defendant for compensation for his injuries. The Court held that as there was implied consent to face the risk, the maxim 'volenti non fit injuria' would be applicable and hence the plaintiff could not get compensation.

iv. Haynes Vs. Harwood:

The defendant had left his van attached with two horses in a crowed street. A small boy threw a stone at the horses, and they began to run. A woman and child were in danger of being hurt. At that time, the plaintiff, a policeman on duty, managed to stop both the horses and saved the lives of mother and child from danger but he sustained injuries in so doing.

The Court held that the defendant was liable for compensation, as the doctrine of volenti non fit injuria is not applicable to cases of saving persons in danger. Moreover, it is the policeman's duty to protect the public from danger.

C. CONSENT OBTAINED BY FRAUD:

Here, the defendant must prove that the plaintiff's consent was voluntary or free. Consent obtained by fraud is not a valid consent and hence a consent obtained by fraud cannot be a defence for the defendant.

i. R Vs. Williams:

The accused, was a music teacher. He was teaching music lessons to a girl student of 16 years of age. Under the pretence that his act of sexual intercourse with her would improve her voice, he had sexual intercourse with her.

The Court held that the mistake which the fraud had induced her to have sexual intercourse with him was **not such that it would go to the real nature of the act done** and hence is act could not be considered as an element affecting the consent.

ii. R Vs. Clarence:

The Court held that the husband was not liable for any offence when he had sexual intercourse with his wife and infected her with venereal disease, even though he had not informed her about this infection earlier. Thus, under Criminal law, fraud affects consent, **only if it induces as to the real nature of the act done.** The same rule is applicable to the tort of battery and assault.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss the scope of the maxim 'volenti non fit injuria'. How far is it applicable in rescue cases?*
2. *Examine the scope of the defence of volenti non fit injuria in the law of torts.*
3. *The maxim of the law is 'volenti non fit injuria' and not 'scienti non fit injuria'. Elucidate with illustrative cases.*

14. INEVITABLE ACCIDENT

(IMPORTANT)

It is an accident which could not be avoided even after the exercise of ordinary care and caution of the defendant. In simple terms, it is an accident which cannot be avoided despite the exercise of ordinary care and caution.

If the injury or loss is due to unavoidable circumstances beyond the human control, then for such injuries, a person cannot be sued under the tort of negligence. Moreover, the accident could not have been foreseen and could not be prevented by the exercise of ordinary care and caution.

The plea of inevitable accident is a defence in cases of negligence, assault and battery. If the injury or loss is due to unavoidable circumstances, then it is not a tort. However, it is not a defence in cases of strict/absolute liability.

E.g.: Dust falling in the eyes of a driver and the subsequent result of an accident, dashing with one another in a crowded area despite of extreme care and caution are all instances of inevitable accident.

CASE LAWS:

i. Nitroglycerine Case:

The defendants who were a firm of carriers had received a wooden case for being carried from one place to another.

As the contents were leaking, they had to open it and see. When it was opened, the Nitroglycerine kept in the wooden case exploded and the office was damaged.

The plaintiff, who was the owner of the building, sued for damages. The defence of 'inevitable accident' by the defendants was accepted and the Court held that the plaintiff could not succeed in his action.

The defence of 'inevitable accident' was accepted for the following reasons:

a. The fact that the wooden case contained nitroglycerine was not made known to the carriers.

b. The properties of Nitroglycerine was also not generally known to the public.

ii. Holmes Vs. Mather:

The defendant's horses got startled by the barking of a dog and started running. They knocked down the plaintiff. The defendant was not held liable under the defence of 'inevitable accident'.

iii. Brown Vs. Kendall:

The defendant accidentally hit the eye of the plaintiff when he was beating his dogs, which were fighting with one another. As it was purely an accident, the plaintiff could not recover damages.

iv. Fardon Vs. Harcourt Rivington:

The defendant had left his dog inside his car, which was parked on the street. The plaintiff was walking near the car and due to that the dog barked and jumped, thereby smashing the glass window. A glass piece entered the plaintiff's eye and he claimed damages. The Court held that he could not recover any damages, as it was purely an accident.

v. Stanley Vs. Powell:

The Plaintiff and the defendant went for pheasant shooting. The defendant fired at a pheasant, but the shot from his gun bounced off an oak tree and injured the plaintiff. The Court held that the injury was due to inevitable accident and hence the defendant was not liable.

DIFFERENCE BETWEEEN INEVITABLE ACCIDENT AND ACT OF GOD:

1. Inevitable accidents are those incidents which a person of ordinary prudence cannot avoid inspite of all reasonable care on his part in the circumstances in which they occur. It is an accident which could not be avoided even after the exercise of ordinary care and caution of the defendant. In simple terms, it is an accident which cannot be avoided despite the exercise of ordinary care and caution.

   Act of God is the operation of natural forces so unexpected that no human foresight or skill could

reasonably expect it. E.g.: cyclone, storm, frost, tsunami, lightning, etc.

2. Both are defences to negligence. However, inevitable accident is not an exception to rule in Rylands Vs. Fletcher whereas Act of God is an exception.

3. Inevitable accident is due to the inevitable act of human being whereas Act of God is due to the natural causes without human intervention.

DIFFERENCE BETWEEN INEVITABLE ACCIDENT AND INEVITABLE MISTAKE:

Inevitable Accident:

1. It is an accident which could not be avoided even after the exercise of ordinary care and caution of the defendant

2. Here, the consequences are not foreseen. In the accident, the consequences are unintended.

3. If successfully proved, inevitable accident is a complete defence.

   For e.g., train accidents, automobile accidents, etc.

Inevitable Mistake: (Mistake of Fact)

'Inevitable Mistake' **means a factual error. It is an erroneous opinion, judgment, or a belier with reference to real facts.**

1. Consequences are foreseen. The consequences are intended but the person acting is ignorant of/has slipped some of the material circumstances.

2. In Tort, mistake is not generally a defence. However, in inevitable mistake, the circumstances which led a defendant to act under mistake will be considered to fix the liability.

   For e.g.,

(a) A, a soldier fires on a mob unlawfully assembled by the order of his superior officer, in conformity. A has committed no offence.

(b) If A arrests Z instead of Y, by mistake under the order of the Court in good faith, he is not liable for any offence.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the defence of 'inevitable accident' and 'Act of God'.*
2. *When can a plaintiff invoke the doctrine of 'inevitable accident'?*
3. *Distinguish between Inevitable accident from Inevitable mistake.*

15. ACT OF GOD (VIS MAJOR)

It closely resembles the defence of inevitable accident. The loss or injury is due to the working of natural sources beyond the power of any human being and which could not be reasonably expected.

'Act of God' is an accident which is due to natural causes directly and exclusively without human intervention and that could not be prevented or averted by the exercise of human care, caution and control.

E.g.: Storm, tempest, lightning, extraordinary fall of rain, high tide, severe frost, etc. 'Act of God' is a good defence to the rule of Strict liability or ***'Rule in Rylands Vs. Fletcher'.***

Nicholas Vs. Marsland:

The defendant was the owner of some pools on his land. The pools and their let-outs were construct without any negligence. A heavy and violent storm broke on the embankments and water flowed out and damage was caused. Since the water had escaped only due to 'Act of God' beyond any human control, the Court held that the defendant was not liable.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the defence of 'Act of God'.*
2. *When can the defence 'Act of God' be invoked?*

16. NECESSITY

Any act causing damage, if done under necessity to prevent a greater evil, is not actionable, eventhough harm was caused intentionally. The basis for accepting 'necessity' as a defence, is the maintenance of public good and self-protection.

E.g.:

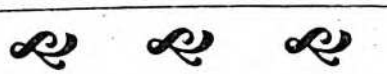
1. Act done in exercise of duties of military authority in times of war.
2. In urgent medical treatment, due to necessity to save a patient's life, the surgeon can proceed with surgery without the patient's consent.
3. If a house is in fire, a person can enter the house and remove the goods, and even pull down the house in order to prevent the fire from spreading.
4. A boatman in the mid ocean, if caught in a heavy storm, may throw overboard, a few bags of cargo to save the passengers and also the boat.

Cope Vs. Sharpe:

The defendant trespassed on the plaintiff's land to prevent the spreading of fire. The Court held that the defendant was not liable, because he acted under necessity.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What is the basis for the defence of Necessity?*
2. What are the essentials for the defence of Necessity?



17. MISTAKE

Here, there is an admission that the act and its consequences were intended, but the defendant acted under an erroneous belief formed on reasonable grounds.

MISTAKE OF LAW: (IGNORANTIA JURIS)

Is not excusable in Crimes and Torts. "Ignorantia Juris non excusat' is the maxim i.e., ignorance of law or mistake of law is no excuse.

MISTAKE OF FACT: (IGNORANTIA FACTUM)

This is excused under the I.P.C. but not so in torts. So even if a person has acted under a mistake of fact, but his act caused harm to another, then he is liable to pay compensation for such harm caused.

E.g.: A man executing a wrong arrest is excused in I.P.C under mistake of fact, but in tort, he is liable for the tort of false imprisonment.

Marrison Vs. Ritchie:

A newspaper proprietor erroneously published that the plaintiff has given birth to twins, whereas she got married only a month before. The Court held that the Proprietor was liable, even though he had acted under mistake of fact.

Mistake is a defence in the following instances:

1. Mistaken prosecution of an innocent person.

2. Mistaken arrest of an innocent person on suspicion of felony.

3. Mistaken honest statements on privileged occasions.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the defence of mistake of fact. Is mistake of law a defence?*

2. *Write short notes on: (i) Mistake of law (ii) Mistake of fact.*

18. PRIVATE DEFENCE

(IMPORTANT)

Private defence is the right of every person to defend his own person or property and that of his near relatives.

If the plaintiff attacks the defendant, then he can defend himself against such attack. The plaintiff may be a competent or an incompetent person. E.g.: Lunatic. Private defence is a self-help.

ESSENTIALS:

1. The force applied must be proportionate to the harm anticipated.

2. In private defence to property, the defendant should be in actual possession of the property or atleast must have a right over it.

3. Reasonable steps can be taken by a person to protect his property.

   E.g.: Fixing broken glass pieces on the wall to prevent thieves entering inside the compound wall of the house, rearing of dogs, etc.

   However, a man should not fix guns or any other dangerous traps without notice.

i. Bird Vs. Holbrook:

The defendant had fixed spring guns in his garden without fixing any notice. A trespasser sustained severe injuries due to the gun shot and hence he sued for compensation.

The Court held that since the force used by the defendant is greater than what is required, he had to pay damages.

ii. Morris Vs. Nugent:

When the defendant was passing by the plaintiff's house, the plaintiff's dog ran and tore the defendant's clothes covering his ankle. The defendant raised his gun to shot the dog, but the dog ran way. Even then, the defendant did not stop and he shot the dog dead even while it was running way.

The Court held that the defendant had used excess force and hence liable to compensate the plaintiff.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What are the essentials of the defence of private defence?*
2. *What is private defence? What are its essentials?*

19. PLAINTIFF - THE WRONG DOER [EX TURPI CAUSA NON ORITUR ACTIO]

One of the principles of Law of Contracts is that a Court does not help a person whose cause of action is tainted with an immoral or an illegal act.

It is known by the maxim ***"Ex turpi causa non oritur actio"*** which means - **from an immoral cause, no legal action arises.**

In law of torts, it is doubtful whether the defendant can take the defence of immoral/illegal act on the part of the plaintiff to escape from the liability of paying compensation for his wrongful act to the plaintiff. In other words, the plea of the defendant that at time of the defendant's wrongful act, the plaintiff was also committing a wrongful act cannot sustain in torts.

Just because the plaintiff was a wrongdoer, it does not disentitle him from recovering the compensation from the defendant for his (defendant's) wrongful act. It is necessary that the plaintiff has to suffer for his wrongful act, but this does not take away his right of action for the harm he suffered due to the defendant's wrongful act.

For e.g.: A, an occupier of a premises intentionally causes unnecessary injuries to a trespasser by creating a trap. Here, the occupier is liable to pay compensation for the injuries sustained by the trespasser. The occupier cannot take the defence that the plaintiff has also committed

the tort of trespass and therefore he need not pay any compensation.

Bird Vs. Holbrook:

The House of Lords held that the plaintiff, though a trespasser over the defendant's land, was entitled to claim compensation for the injuries sustained by him due to the gun shot kept in the defendant's garden without notice.

EXCEPTIONS TO THE RULE OF EX TURPI CAUSA NON ORITUR ACTIO:

1. If the plaintiff himself is a wrongdoer, and if his **unlawful act is directly connected with the injury** suffered by him, only then he cannot claim any compensation from the defendant. In other words, if the plaintiff's own act is the cause for the harm suffered by him, then he has no cause of action.

   For e.g.: A cyclist, without head light in the cycle, falls into a pit on the road side, digged by the municipality for repair work and in the process, the cycle was damaged. Here, he cannot claim any compensation from the municipality, as he himself was negligent.

2. In the case of contributory negligence on the part of the plaintiff, he is not totally disabled from claiming any compensation from the defendant, but his right to claim the full amount is reduced proportionally to the extent and degree of his contributory negligence in causing the accident.

20. STATUTORY AUTHORITY

If any act is done as per the authority and direction given under a Statute and there by, if any damage or loss results to the plaintiff by such an act, then **no action can lie against the person doing such act**. In other words, if there had been no such Statute, then such act would be actionable as tort.

Thus the Statute gives **complete protection** to the person doing the act and the plaintiff is entitled only to such compensation, if any, as is provided under the Statute. The Statute gives immunity to the executors against both the direct injury/loss and also for the incidental harms.

For e.g.: For the noise pollution due to the flying of aircrafts, running of trains, buses etc., the affected party/ies cannot claim compensation as the above operations are authorised by Statutes like Aircraft Act, Railways Act, Motor Vehicles Act, etc.,

i. Vaughan Vs. Taff Vaide Railway Company:

The defendants were authorised to run railway trains. The woods on the adjoining land caught fire by sparks from the rail engine. It was held that since the defendant had taken proper care to prevent the emission of sparks and since they were doing operations within the scope of the authority specified under the Statute, they were not liable.

ii. Hammer Smith Rail Co. Vs. Brand:

The plaintiff's property was situated adjoining the railway line. Due to the noise, vibration and smoke emitted by the running of the trains on the railway line constructed under the Statutory powers, the value of the plaintiff's property had considerably reduced.

The Court held that since the damage caused was incidental to the running of the trains authorised by the Statute, no action could lie.

It is necessary that the **acts authorised by the Statute must be done carefully and not negligently**.

iii. Smith Vs. London and South Western Railway Co.,:

The grass and hedges growing near a railway line were cut off and negligently left at the same place by the servants of the defendant's Railway Company. They caught fire from sparks of the rail engine. Due to heavy winds, the fire spread to the nearby plaintiff's cottage, which was totally burnt.

The Court held that though the acts were authorised by a Statute, since there was negligence on the part of the servants of the defendant company, the defendant company was liable to pay compensation to the plaintiff.

TYPES OF STATUTORY AUTHORITIES:

Statutory authority may be of **two** types:

1. Absolute statutory authority:

2. Conditional statutory authority.

1. Absolute statutory authority:

Here, the statute gives absolute authority for doing an act, which may cause harm or nuisance. But it is not actionable and there is no liability for the act. Eg., in the construction of railway line, even if there is nuisance to a private land, it is not actionable.

2. Conditional statutory authority:

In this case, the statute gives conditional authority for doing an act. It means that the act authorized can be done, only if no harm or nuisance is caused. Such conditional authority may be express or implied.

Metropolitan Asylum District vs. Hill:

A hospital for small pox was set up in a residential area and so, the residents of the area suffered from infection from the hospital. In this case, though there was statutory authority for erecting an hospital, it could be done only without creating nuisance.

The Court held that it is a conditional statutory authority, and the hospital was ordered to be removed, because of causing nuisance.

21. THE JUDGES (PROTECTION) ACT, 1985

The Judges (Protection) Act, 1985 is an Act for securing additional protection for Judges and others acting judicially.

The main provisions of the Act are as follows:-

1. **The term "Judge" means every person who is officially designated as a Judge and also every person—**

a) who is empowered by law to give in any legal proceeding a definitive judgment, or

- a judgment which, if not appealed against, would be definitive, or

- a judgment which, if confirmed by some other authority, would be definitive; or

b) who is one of a body of persons empowered by law to give such a judgment.(Sec.2)

2. **Additional protection to Judges:**

A court should not entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of or in the discharge of his official or judicial duty or function.

3) However, the above provision does not debar or affect the power of the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority to take such action (whether by way of civil, criminal, departmental proceedings or otherwise) against any person who is or was a Judge.(Sec.3)

4) The provisions of this Act are in addition to, and not in derogation of the provisions of any other law providing protection of Judges.

22. DEFENCE OF TRIVIALITY (DE MINIMIS NON CURAT LEX)

This doctrine is based on the legal maxim ***"De minimus non curat lex"***. Law does not care about trifles. There are innumerable acts, without performing which, men cannot live in society.

E.g.: A man cannot pass through a crowd without hurting any one.

So, such small acts cannot be treated as torts.

An act is not a tort if

1. The harm caused by the act is so slight.
2. That a person of ordinary sense shall not complain of it.

E.g.: A man was charged by another for telling a lie. But this was rejected under the defence of triviality.

Uttering a lie, stepping on another's toes, etc., are trivial acts which an ordinary man would not complain.

VICARIOUS LIABILITY
(MASTER AND SERVANT)

This topic includes five sub chapters:

A. RULES OF VICARIOUS LIABILITY
(MASTER'S LIABILITY TO SERVANT'S ACTS)

B. SERVANT AND INDEPENDENT CONTRACTOR
(CONTRACT OF SERVICE AND CONTRACT FOR SERVICE)

C. STATE LIABILITY FOR TORTS

D. COURSE OF EMPLOYMENT

E. DOCTRINE OF COMMON EMPLOYOMENT

23. RULES OF VICARIOUS LIABILITY
(MASTER'S LIABILITY TO SERVANT'S ACTS)

[MOST IMPORTANT]

SYNOPSIS:

A. Introduction

B. Basis/Principles of Master's liability

C. Essential conditions for Master's liability

D. Rules of Master's liability

E. Master's non-liability

A. INTRODUCTION:

A master is liable for the wrong done by his servant in the course of his employment. This is known as the doctrine of 'Vicarious Liability'.

According to Salmond, 'in general, a person is responsible only for his own acts, but there are exceptional cases in which the law imposes on him vicarious responsibility for the acts of others, however blameless, he himself.

B. BASIS/PRINCIPLES OF MASTER'S LIABILITY:

There are **three** principles involved in making the master liable for the acts of the servant. They are:

1. Omni rati habitio retrora hitur et mandato priorioequi paratur:

It means the ratification or approval of an act relates back to the date when the act was actually committed. For e.g., if an act is done by a servant 'A' and if it is approved by the Master 'B', then the act is deemed to to have been done by the master B himself on the day the servant A had committed the act.

In other words, if a person approves an act of another, then the former is bound by such act and also it relates back to the original rate of commission.

2. Qui facit per alium facit perse:

It means 'He who does an act through another, does it himself' or 'He who acts through another is deemed to act

in person'. In such a case, the person authorising is liable not only for the act actually authorised, but also for its direct consequences.

3. Respondeat Superior: (Let the Principal be liable):

It means - 'let the superior be responsible'. All acts done by the servant in the master's business are deemed to be the acts done by the master himself. Since the master is rich and capable of bearing the civil liability and paying the compensation, he is made liable for all the activities of the poor servant who is financially weak and cannot pay the compensation to the injured party.

C. ESSENTIAL CONDITIONS FOR MASTER'S LIABILITY:

Only if the following conditions and rules are complied with, the master is liable for the acts of his servant. Otherwise, the master is not liable.

1. The relationship of master and servant should exist between the defendant and the actual wrong doer.

2. The tort must be committed by the servant while he was engaged in the course of employment of the master.

3. If the relationship of master and servant does not exist, but if one person had engaged another to do a specific act as per his (latter's) independent will and direction, then the relationship is that of Principal and Independent Contractor. The master is not liable for the tort of an Independent Contractor.

D. RULES OF MASTER'S LIABILITY:

I. NATURAL CONSEQUENCE OF AN ACT BY THE SERVANT:

In order to bind the master, the following essentials are necessary under the rule.

1. The loss or injury must be out of natural consequence of the act.

2. Such act must be done with the ordinary care.

3. Such an act must be done with the master's specific order.

Gregory Vs. Piper:

There was a dispute as to the right of pathway between Gregory and Piper. To stop Gregory, Piper ordered his servant to heap rubbish. The rubbish slided down to Gregory's house. Gregory sued Piper for trespass. It was held that the master was liable for the acts of his servant.

II. WANT OF CARE OR NEGLIGENCE OF THE SERVANT:

They are of **two** types:

1. Act done in the actual employment.
2. Act done not in the actual employment.

1. Act done in the actual employment:

a. The servant must be employed to do the particular act alone.

b. In doing such act, the servant must be negligent.

c. The loss or injury must be direct due to the negligence of the servant.

i. Baylee Vs. Manchester [illegible]ield and Lincolnshire Railway:

The porter of the defendant's Railway Company misdirected a passenger to get out of the right train, by violently pulling him out of the carriage. The passenger sued the Railway Co., for compensation for the tort committed by the porter.

The Court held that the defendant's Company was liable, because the act was done in the course of employment and the servant was authorised to do the act. The wrong committed by the porter was due to negligence or want of care.

ii. Milner Vs. Great Northern Railway:

A porter of the great Northern Company negligently ran against another porter. The porter, in turn, dashed against the Ticket Collector, who dashed against Milner's wife, and she sustained injuries, which resulted in her death. Milner sued the Railway Company for compensation.

The Court held that the Railway Company was liable to pay damages, because the injury was caused by the servant's want of care or negligence.

2. Act done not in the actual employment:

If any act is done for which the servant is not employer, then the master is not liable for the negligence of the servant.

i. Williams Vs. Jones:

Jones employed a carpenter to make a signboard in the shed of Williams. The carpenter in lighting his cigarette pipe negligently threw the match on the floor and that act set fire to the shed. It was held that the master was not liable, because -

a. The negligence was not in making the name board, which is the master's business.

b. The negligence was in smoking the pipe, which is the servant's habit (business).

ii. Nalini Rajan Sen Gupta Vs. Corporation of Calcutta:

The driver and the cleaner were sent to repair a car in a workshop. Due to heavy traffic, the road leading to the workshop was blocked. Hence the driver left the car in charge of the cleaner and went to the workshop.

During the absence of the driver, the cleaner drove the car negligently and dashed against a Municipal lamp post and damaged it. The act committed by the cleaner was beyond the scope of his employment and moreover, the driver had been negligent in leaving the vehicle with the cleaner.

So, the Court held the master was not liable, but the cleaner was personally liable.

III. Excessive or Mistaken act by a servant:

1. The servant must have exceeded his lawful authority given by the master, or he must have mistaken that he is given more authority, which is not actually so.

2. The injury or loss must be out of the excessive or mistaken act of the servant.

Baylee Vs. Manchester Railway:

The porter of defendant's Railway Company misdirected a passenger to get out of the right train, by violently pulling him out of the carriage. The passenger sued the Railway Company for compensation for the tort committed by the porter. The Court held that the defendant's Company was liable, because the porter committed the wrong due to mistaken lawful authority.

IV. Wilful wrong by the servant:

1. The wrong done must be a willful wrong.

2. Such wrong must be done on behalf of the master.

3. Such wrong must be done with the intention of serving the master's purpose.

Limpus Vs. London General Omnibus Company:

The driver of London Bus Company, willfully raced his bus and overtook other buses to get more passengers and benefit his employer. In so driving, an accident was caused. Though the master had instructed the driver not to race or obstruct other buses, he was liable for the wrong as the act by the driver was done in order to benefit his employer.

V. FRAUDULENT ACT OF THE SERVANT:

1. The wrong done must be due to the fraudulent act of the servant.

2. Such an act must be on the master's behalf.

i. Lloyd Vs. Grace Smith and Company:

A widow sought advice from a firm of solicitors as how to improve her income. The Manager of the firm advised her to sell her property. The widow authorised the Manager to sell the property and collect the money, but the Manager absconded with the money. The widow sued the firm for compensation for the fraud committed by its Manager.

The Court held that the firm was liable to pay compensation for the fraud committed by its Manager.

ii. State Bank of India Vs. Shyama Devi:

A customer of the bank gave some amount to a bank employee (in his capacity as a friend) for being deposited in

the customer's account. He did not obtain any receipt for the same. The bank employee misappropriated the amount.

In an action by the customer against the bank, the Court held that the bank employee was not acting within the scope of his employment i.e., the act done by the employee was outside the course of employment and hence the bank could not be made liable.

VI. Criminal act by the servant (Theft, etc.,):

The master is not generally liable for the criminal acts of the servant, but if there is a tortious case in a Civil Court for such a criminal act, then the master is liable.

In all cases, where the master is not liable for the acts of the servant. For e.g., fraudulent act, criminal act, acts outside the employment, if he makes any payment to third parties, he has got a right to recover the same from the servant. This is called **'master's right of recover of damages from his servant'**.

VII. Servant working under two masters:

When a master lends his servant to another for a certain transaction, then the servant has two masters for the time being.

When a servant has two masters, the responsibility for the tort committed by him lies exclusively upon the master for whom and under whose control he was working when he did the work complained of.

E. MASTER'S NON-LIABILITY:

In the following **three** cases, the master is not liable for the tort committed by his servant.

1. When the master has temporarily lent his servant to another person, then the master is not liable for the torts committed by the servant during the employment by the other person.

2. When the master is obliged by law to employ a particular person as his servant, then the master is not liable for torts committed by such person.

3. When the relationship between the master and servant is of Government employee and Government, then the Government is not generally liable (sovereign functions).

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss the liability of master to servant for the injuries suffered by the servant during the course of employment.*
2. *"Generally an employer is not responsible for the tort of his independent contractor" Discuss.*
3. *"The master is liable for any tort which the servant commits in the course of his employment. The servant himself is also liable" - Discuss.*
4. *Distinguish between a servant and an independent contractor.*
5. *Explain what is meant by 'course of employment'.*

24. SERVANT AND INDEPENDENT CONTRACTOR

(CONTRACT OF SERVICE AND CONTRACT FOR SERVICE)

SYNOPSIS:

A. *Introduction*

B. *Liability of employer for the torts of Independent Contractor*

C. *Liability of Independent Contractor*

D. *Difference between Servant and Independent Contractor*

A. INTRODUCTION:

A servant is an agent who is subject to the control and supervision of his employer regarding the manner in which the work is to be done. An independent contactor is not subject to any such control.

However, he undertakes to do certain work and regarding the manner in which the work is to be done, he is his own master and exercises his own discretion. He is not under the order or control of the person for whom he does the work and in this aspect, he differs from the servant, who acts in strict obedience of the directions of the master.

i. *Morgan Vs. Incorporated Central Council:*

M visited N's premises, and fell down from the open lift shaft, which was under the care and maintenance of an independent contractor 'O'. The Court held that the owner

of the premises N was not liable for the negligence of the contractor 'O' and further held that O was liable to compensate M.

Many accidents are caused by mechanics, repairers or owners of workshops during test drives of the vehicles entrusted to them by the owners of the vehicles for repairs.

Thus in cases where the owner of a vehicle gives the vehicle for repairs to a mechanic shop, the workers employed in the workshop cause any accident, then the question arises as to who is responsible for such accident - whether the owner of the vehicle or the owner of the repair shop.

The various judgments of Supreme Court and High Courts have held that the owner of the repair shop alone is liable.

ii. In B. Govindarajulu Vs. M.L.A. Govindaraja Mudaliar:

A motor lorry was entrusted by its owner for repairs. While an employee of the repair workshop drove it, there was an accident.

The Court held that the owner of the lorry was not liable vicariously, because the owner of the workshop was an independent contractor and not the servant of the lorry owner.

B. LIABILITY OF EMPLOYER FOR THE TORTS OF INDEPENDENT CONTRACTOR:

Generally, a master is not liable for the torts of an independent contractor, but under the following circumstances, master is liable for the torts of an independent contractor:

1. An employer is liable for the act of independent contractor in the case of strict liability (Rylands Vs. Fletcher).

2. If an employer or master instigates independent contractor to commit a tort, he is liable for the tort of the independent contractor.

   E.g.: If a passenger instigates a taxi driver to drive fast and due to this, if an accident occurs, then the passenger is liable.

Ellis Vs. Sheffield Gas Consume Co.,:

A Gas Company employed an independent contractor to dig up a street, which was an illegal act. Ellis fell over the heap of earth and was injured. As the Gas Company authorised the nuisance, it was held liable for the act.

3. If the employer fails to take precaution in appointing a competent independent contractor, then he is liable for the damage caused by the acts of the contractor.

Tarry Vs. Ashton:

Ashton fixed a lamp outside his house and due to the negligence in fixing it, a passer-by was injured. The Court held that Ashton was liable, as it was his duty to see that it was fixed properly.

The owner of building's electric post was also liable for the negligence of the independent contractor, on the ground that he had appointed an unqualified electrical contract.

4. An employer on whom there is legal or statutory duty is responsible for the torts of independent contractor.

5. If an employer employs a contractor in order to engage some workmen, then a workman is entitled to claim compensation from the employer (under the Workmen's Compensation Act 1923).

6. An employer is liable for the acts of the independent contractor in the case of extra hazardous work which has been entrusted to an independent contractor.

7. The liability of the employer also arises for the dangers caused on or near the highway.

8. When the tort results in the breach of a master's common law duties to his servant, the master is liable for the same and it is no defence that the master was acting through an independent contractor.

C. LIABILITY OF INDEPENDENT CONTRACTOR:

i. An independent contractor is liable for all the acts of his employees / workmen employed under him, under the principle of vicarious liability.

ii. For all injuries, etc., sustained by his employees in discharge of the contract work of a third party, the independent contractor - in the capacity of employer alone is liable and not the contracting third party.

iii. For any loss or damage caused by the acts/ negligence of the employees of the independent contractor in carrying out the contract work of a third party, he is liable to compensate the third party for such losses/ damage.

D. DIFFERENCE BETWEEN SERVANT AND INDEPENDENT CONTRACTOR:

SERVANT	INDEPENDENT CONTRACTOR
1. A servant is under the continuous and direct control of the master. The master has the right to control and direct the servant in the mode of doing the act.	1. An independent contractor is his own master having full power over his own activities. He is not under the direct control of the employer.

2. A servant is an agent who works for the master under his supervision. He is employed to obey his employer's orders from time to time.	2. An independent contractor is engaged to do certain work in his own direction. He is not bound by the order of his employer.
3. E.g.: A person's chauffeur is his servant and if by negligent driving, he runs over someone in the street, the master is liable.	3. E.g.: If a person hires a taxi for a particular journey, the driver of taxi is not his servant. He only has contracted to take him in the taxi to a certain place. If any accident happens by the driver's negligence, then the driver/owner of the taxi alone are liable and not the hirer of the taxi.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss contract of service and contract for service with special reference to employer's liability.*
2. *Explain the difference between a servant and an independent contractor.*
3. *Explain the master's liability for the acts of the servant working under an independent contractor.*
4. *Explain the liability of Independent Contractor.*

25. STATE LIABILITY FOR TORTS

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. State liability for torts

1. Sovereign functions

2. Non - Sovereign functions

C. Present legal position

D. Liability of State for victims of State excesses

A. INTRODUCTION:

In England, "**The King can do no wrong**" was the maxim prevalent for centuries together. The above maxim was based on the principle that no human agency could enforce law against the King, as he was the ruler and all the Courts were his Courts. He could sue others, whereas others could not sue him.

In the 20th century, the system of monarchy became obsolete and the Crown Proceedings Act 1947 was passed to place the Ruler also in the same position of an ordinary citizen. This Act had necessarily to be passed due to the expanding commercial and other ancillary activities of the Government for which the Crown was the Head.

So, the present position of English Law is that '**King can be sued and is not exempted from all liabilities**'.

In India, the maxim 'King can do no wrong' was partly accepted. Both the Union and State Governments are legal persons and therefore can be used for certain tortious and contractual liabilities.

B. STATE LIABILITY FOR TORTS:

Before 1947, in England as well as in India, the King, could not be sued for Torts in his own Courts under the doctrine of Sovereign immunity. The Federal Torts Claims Act 1947 and The Crown Proceedings Act 1947 entitled the affected victims of the tortious acts to recover damages from the Crown.

Article 300 of the Indian Constitution provides that the State or Government may sue or be sued for tort as in the same manner before the enactment of the Constitution (1858).

The State is a legal entity and has to act through human agency. The tortious liability of the State means the liability of the State for the torts committed by its servants and for this, the State is vicariously liable for the torts committed by its servants.

This is based on the maxims '**Respondent Superior**' meaning '**Let the Principal be liable**' and '**Qui facit per alium facit perse**' which means '**He who does an act through another does it himself**'. In order to find out whether the State is liable for the torts committed by its servants, the functions of the State are divided into -

1. Sovereign functions
2. Non Sovereign functions

1. Sovereign Functions:

These are the functions that can be carried on only by the Government and not by Private individuals. The Government runs these departments mainly on the basis of service motive.

There is no profit earning principle involved in the exercise of sovereign functions. The Government is not liable for any tortious act committed by its servants. E.g.: military, police, prison, etc.

2. Non - Sovereign Functions:

These are the functions that can be carried on even by private individuals. It is run with profit motive and hence compensation is always given. E.g.: Motor Transport Company, Co-operative Super Market, etc. The Government is liable for the tortious acts committed by its servants.

The following are the important Case laws to distinguish between Sovereign and Non Sovereign functions:

i. P.O. Steam Navigation Co. Vs. Secretary of State for India:

The servants of a dockyard were carrying iron rods and were crossing a road. When they were at the centre of the road, a horse with coach rushed towards them at a high speed. The servants dropped the iron rods and ran away.

The horse fell down and subsequently died. The coach owner sued the Secretary of State for damages under the tort of negligence.

The Supreme Court held that the Secretary of State was liable for negligence of his servants in the same way as an ordinary employer is liable, as it was a non-sovereign function.

ii. Vidyavathi Vs. State of Rajasthan:

A Government jeep driver driving a Government jeep, after repairs from a workshop, knocked down a pedestrian by his rash and negligent driving. The pedestrian sustained injury and subsequently died. The window sued for damages. The Supreme Court held that driving a jeep from the workshop was a non-sovereign function and hence the Government was liable to pay damages.

iii. Kasthurilal Vs. State of U.P.:

Kasthurilal was arrested under suspicion that he was keeping stolen jewels. The jewels were taken from him and kept in police custody but after verification, it was found that he was a bonafide person and hence released. When the jewels were to be returned, they were found missing.

A Police Constable stole them and ran away to Pakistan. In an action by the affected party, the Supreme Court held that it was a Sovereign function and hence the State was not liable to pay compensation.

iv. Shyam Sundar Vs. State of Rajasthan:

Here, the Court handled the Sovereign function in a liberal way. A truck belonging to P.W.D. driver for famine relief work caught fire due to the negligence of the driver.

One of the occupants who jumped from the truck died due to dashing against a stone. When the widow sued for damages against the State, it was held by the Court that the State was liable, as famine relief work was not a Sovereign function and could be undertaken by private individuals.

Thus the Government can claim immunity from tortious liability, only if it is in exercise of its Sovereign functions. The test to find out whether the act committed by the Government was Sovereign or non Sovereign, it must be seen whether the act can be carried on by private individuals or only by the Government.

If the function can be carried on only by the Government, then it is Sovereign function. If it can be carried on by any private individual also, then it is a non Sovereign function and the Government is liable for torts in such cases.

v. Nagendra Rao Vs. State of A.P.:

Certain goods were confiscated. Confiscation was set aside. The appellant sued for return of goods or price. The Supreme Court held that when the confiscation was held illegal, the appellant was entitled to the price of the goods and interest.

The Court observed that Sovereign immunity can not be a defence where officers of State are guilty of wrongly and illegally interfering with life and liberty of a citizen.

C. PRESENT LEGAL POSITION:

1. The Law Commission of India 1956, considered the tortious liability of the Government and recommended the relaxation of the immunity of the Government and abolition of the distinction between Sovereign and Non Sovereign functions.

It expressed the view that Government should place itself in the same position as a private individual as for as tortious liability is concerned. **But this Bill has not been enacted so far.**

2. In England, after the Crown Proceedings Act, 1947 - with certain exceptions, the Crown is liable for the torts of its servants or agents.

In India, there is no such legislation. The position of law as regards the liability of Government for the tortious acts is uncertain and it is necessary that the Legislature should enact a specific legislation regarding the liability of the State for the torts of its servants.

The legislature can very well enact a law on this subject under Article 300. The Law Commission have already adversely commented on the present law of India on this subject and also have prepared a Bill. But unfortunately no law has still been enacted.

3. *Discuss with the help of decided cases the importance of classification of State's power as Sovereign power and Non-Sovereign power.*
4. *Discuss the liability of the State under torts with the help of decided cases.*
5. *Discuss with the help of leading cases the importance of classification of State's power as Sovereign power' and Non-sovereign power'.*
6. *Critically examine the liability of state for torts committed by its servants.*
7. *Discuss the tortuous of the Administrative authorities with help of decided cases.*
8. *Compare and contrast Sovereign act with Act of State and Non Sovereign Act.*
9. *Discuss the tortious liability of the State with specific reference to Rudual Shah Vs. State of Bihar.*

26. COURSE OF EMPLOYMENT

(SHORT NOTE)

The master is liable for the tort of his servant only if the tort is committed in the course of his employment.

MEANING OF COURSE OF EMPLOYMENT:

1. A wrongful act authorised by the master, or

2. A wrongful and unauthorised method or mode of doing some act authorised by the master.

RULES REGARDING COURSE OF EMPLOYMENT:

1. The master is liable for an act authorised by him and also for the mode of performing such act. The master is thus liable for negligence, fraud or mistake of the servant committed under his authority.

Baylee Vs. Manchester Railway:

The porter of the defendants Railway Company misdirected a passenger to get out of the right train, by violently pulling him out of the carriage. The passenger sued the Railway Company for compensation for the tort committed by the porter.

The Court held that the defendant's company was liable for compensation because the act was in the course of employment and the wrong committed by the porter was due to negligence or want of care.

2. If for any act done for which the servant is not employed, then the master is not liable for the negligence of the servant.

Williams Vs. Jones:

Jones employed a servant carpenter to make a signboard in the shed of Williams. The carpenter in lighting his pipe, negligently set fire to the shed. It was held that the master was not liable, because -

a. The negligence was not in making the pipe, which was the master's business.

b. But the negligence was in smoking the pipe, which was the servant's habit (business).

EFFECT OF PROHIBITION:

If the servants disobeys any instruction given by the master in respect of the duties of employment of the servant, then the master is not liable for the torts committed by the servant.

i. Limpus Vs. London General Omnibus Company:

The driver of London Bus Company wilfully raced his bus and overtook other buses to get more passengers and benefit his employer. In so driving, an accident was caused.

Though the master had instructed the driver not to race or obstruct other buses, he was liable for the wrong as the act of the driver was done in order to benefit his employer.

ii. Twine Vs. Bean's Express:

The employers had expressly instructed their driver not to allow unauthorised persons to travel in their vehicles and had also affixed a notice to this effect in the driver's cab.

In spite of this, the driver gave a lift to a person who was killed by the driver's negligence. The Court held that the employers were not liable as the driver acted outside the scope of his employment.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss with reference to leading cases, the meaning of "Course of Employment" for purposes of vicarious liability of the master.*

2. *"The Master is liable for torts of his servant if the tort is committed in the course of employment". Explain.*

27. DOCTRINE OF COMMON EMPLOYMENT

SYNOPSIS:

A. Introduction
B. Meaning
C. Essentials
D. Criticism
E. Position in India

A. INTRODUCTION:

The doctrine of Common Employment was an exception to the rule that a master is liable for the wrongs of his servant committed in the course of his employment.

B. MEANING:

As per the doctrine of common employment, a master is not liable for the negligent act/harm done by one servant to another fellow servant acting in the course of their common employment.

Priestly Vs. Fowler:

The plaintiff was defendant's servant and was injured due to the breakage of goods overloaded by another servant of the defendant. Since both the wrongdoer and the injured person were the servants of the same master, the doctrine

of common employment was applicable and hence the master was held not liable.

C. ESSENTIALS:

1. The wrongdoer and the person injured must be fellow servants under the same employer.

2. At the time of the accident, they must have been engaged in common employment for doing/sharing the same work.

D. CRITICISM:

The doctrine was vehemently criticised by various judicial decisions and was finally abolished by the Law Reform (Personal Injuries) Act, 1948.

Wilson and Clyde Coal Co., Vs. English:

The Court observed - the scope of the doctrine of common employment was curtailed by judicial decision observing that the doctrine is inequitable under modern conditions in England and it should not be extended to India, as it would not be suitable to Indian conditions.

As per the Workmen's Compensation Act passed in 1925, the employer is now bound to pay compensation for any personal injury caused to its servants by an accident 'arising out of and in the course of the employment' either by the negligence of the co-servant or otherwise.

E. POSITION IN INDIA:

In India, the doctrine of common employment came under severe criticisms in a number of cases.

Secretary of State Vs. Rukminibai:

The Plaintiff's husband, an employee of G.I.P. Railway was killed, because of the negligent act of a fellow employer. The Nagpur High Court held that the employer was liable.

The scope of the doctrine is now totally limited (almost abolished) by various Statutes - the Workmen's Compensation Act, 1923, the Employee's State Insurance Act, 1948, the Personal Injury (Compensation Insurance) Act, 1963 and Motor Vehicles Act, 1988 which have imposed liability on the employers to compensate their employees even if the injury or death has been caused by the negligent act/s of the fellow employees.

UNIT-III

NEGLIGENCE

This topic contains three sub chapters -

A. NEGLIGENCE AND ITS RULES
B. CONTRIBUTORY NEGLIGENCE
C. MEDICAL NEGLIGENCE

28. NEGLIGENCE AND ITS RULES

SYNOPSIS:

A. ***Introduction***
B. ***Essentials of Negligence***
C. ***Manufacturer's Negligence and his Liability***
D. ***Medical Negligence and Liability***
E. ***Builder's Negligence and Liability***
F. ***Res Ipsa Loquitur***
G. ***Defences for Negligence***

A. INTRODUCTION:

'Negligence' is the breach of a legal duty by omission to do something which a reasonable man would do or by doing something which a reasonable man would not do. So negligence arises from nonfeasance or misfeasance.

REASONABLE MAN:

The term **'reasonable man'** means a legal fiction of the common law representing an **objective standard** against which any individual's conduct can be measured.

The term 'reasonable man' is used to determine if a breach of the standard of care has occurred, when there is a duty of care owed by him. Negligence is simply neglect of care which law requires. The concept of care is a correlative term.

For e.g., a man carrying a sharp edged tool, when he is in the crowd must be more careful than the person carrying an umbrella. Care is measured by the conduct of a **reasonable man** in that particular situation. The degree of care varies with the circumsta nces and chances of risk.

Negligence, therefore amounts to the absence of care which a **prudent and reasonable man** would take in the circumstance. It is not necessary that the duty neglected should have arisen out of a contract between the plaintiff and the defendant.

Negligence in law is, therefore -

1. A breach of Lawful duty
2. Unintentional
3. Producing injury to another

The law of negligence is really the application of common morality and common sense to the activities of the common man.

Degree of care:

The degree of care, which a man is required to use in a particular situation, varies with the obviousness of the risk. If the danger is slight, only a slight amount of care is required.

But persons who profess to have special skill or who have voluntarily undertaken a higher degree of duty are bound to exercise more care than an ordinary prudent man.

It is based on the maxim - ***imperitia calpa adnumeratur*** meaning - 'lack of skill is treated as a fault or negligence'.

Standard of care:

In order to fix a person liable for negligence, the law takes into consideration the standard of care required in the circumstances. The standard of care is assessed by considering the following points:

1. THE IMPORTANCE OF THE OBJECT TO BE ATTAINED:

The risk may be taken according to the purpose of the act. If the purpose is very important, then abnormal risk may be taken. E.g.: A fire brigade may be driven at a high speed, but a normal vehicle may not be driven at that speed.

Latimer Vs. A.E.C. Ltd.:

The respondent's factory was flooded by water, and after the water subsided, the oil which was mixed in it stayed on the floor.

Though the respondents spread saw dust on the floor, some parts were left uncovered, and the appellant slipped and fell down. He sustained injuries. He sued the respondents for negligence and contended that the respondents should have closed the factory, till the oil was completely got rid of.

But it was held that the risk of the slippery floor was not so great as to close the factory with 4000 workmen. The respondents were not held liable for negligence as they acted like a **prudent man.**

2. THE MAGNITUDE OF RISK:

Negligence is the failure to take due care. 'Due' means the degree of care which a reasonable man ought to take in a given occasion.

According to the situation, the degree of care varies. A man carrying a sharp edged tool in a crowd should be more careful than a man carrying a stick.

The degree of care depends upon the magnitude of risk which a reasonable and **prudent man** would have foreseen. Care should be great while transporting petrol or inflammable material than milk or water.

Sagar Chand Vs. State of Jammu and Kashmir:

Two children who were passing through a field for taking bath. The electric line was under repairs and due to negligence of the linemen, the children got electrocuted and died. The State Department was held vicariously liable for the negligence of the linemen and compensation was paid to the legal heirs.

3. THE AMOUNT OF CONSIDERATION FOR WHICH SERVICES, ETC, ARE OFFERED:

The degree of care depends on the kind of services offered by the defendant and the consideration charged from the plaintiff for such services.

For e.g.: A glass of water sold on the street for 50 paise may be expected to be pure to a certain extent, but the mineral water bottle sold for Rs. 15/- is expected to be of higher degree of purity.

Thus, a five star hotel charging high price from its guests are expected to show high degree of care regarding quality and safety of its structure and services it offers. Here, for any damage caused to the guests, exemplary damages are payable.

B. ESSENTIALS OF NEGLIGENCE:

1. The defendant should be under a legal duty of care and skill.

2. Such duty must be towards the plaintiff.

Hadley Byrne and Co. Ltd., Vs. Heller and Partners Ltd.,:

The plaintiff's entered into contract with Easipower Limited relying on the defendant's private enquiry on statement about their credit worthiness. Subsequently Easipower went into liquidation and the plaintiff suffered a loss.

The House of Lords held that there was a duty to take care in making the statement about Easipower on the defendants and if there was a breach of duty, it amounted to negligent act and hence liable.

3. The defendant must have failed to perform that duty.

4. The loss or damage must be direct from the negligent act of the defendant.

5. To establish negligence, the injury must be foreseeable and also there is reasonable likelihood of the injury. The duty is to guard against probabilities rather than remote possibilities.

Blyth Vs. Birmingham Water Works Co.,:

A plug installed by the defendants worked satisfactorily for 25 years. It was damaged due to an exceptionally severe frost in 1855. The Court held that the defendants had provided against ordinary frosts as of ordinary prudent man and hence, they were not guilty of negligence, because the damage was caused by extreme severity of the frost.

6. The burden of proof of negligence is on the plaintiff. But in ***res ipsa loquitur*** ('The thing speaks for itself'), the burden of proof is on the defendant.

i. Grant Vs. Australian Knitting Mills:

The buyer purchased some 'under wears'. After wearing them, he was infected by a skin disease due to the presence of silicon particles in the underwear.

The Court held that the defendants were liable on the ground of negligence in manufacture. The Court further observed that the possibility of the intermediaries (retailers) tampering with the clothes being ruled out, the manufacturer was held liable.

ii. Dann Vs. Hamilton:

Dann, a lady (the plaintiff) got into a motor car. She knew that the driver was drunken and so the chances of accident were great. Still, she chose to travel in that car. She was injured in an accident. The driver was also killed.

Dann claimed damages from the wife of the driver. The driver's wife Mrs. Hamilton contended that Dann could not claim damages, because of her knowledge and implied consent to face the risk of travel in a car driven by a drunken driver.

The Court held that the driver was negligent, as he was not supposed to drink while on duty and the implied consent of Dann to face the risk does not apply to cases of

negligence and so Dann could claim damages from the driver's wife Hamilton.

iii. Austin Vs. Great Western Railway:

Mrs. Austin carried her son aged 3½ years to travel by rail. She took a ticket for herself but not for her son. She had no intention to defraud the Railway Company. Due to the negligence of the Railway Company, her son was injured.

The Court held that her son could sue the Railways Company and recover compensation. For a claim in tort, there need not be any contract between the injured party and the railway company.

iv. Bourhill Vs. Young:

X, a fisherwife who was pregnant got down from a tram car, when a motorcyclist passed the tram car and collided with a motorcar. Though she did not see the accident or the motorcyclist, the noise of the collision shocked her and she gave birth to a still born child.

The Court held that the representatives of the motorcyclist were not liable to give compensation because X was outside the area of foreseability.

v. Bolton Vs. Jones:

The plaintiff was standing in a highway outside her house. There was a cricket ground adjoining the high way. A ball hit by a batsman came and hit the plaintiff. The chance of such accident was very remote and hence the Court held

that the cricket club was not negligent in not having taken precautions agai nst such accidents.

vi. Forest Vs. Gillingtam Corporation:

There was crater made by a bomb and there was a barrier near the crater and lamps were placed upon the barrier. The lamps were extinguished due to strong wind and the man who was responsible for lighting the lights failed to visit them at night.

The plaintiff riding a bicycle clashed against the barrier and received injuries. The defendant (local authority) was held liable for negligence.

vii. Carmarthenslive Country Council Vs. Lowis:

Due to the negligence of a teacher, a four year old boy ran out from the school to a public highway. A lorry driver's wife claimed compensation for the negligence of the nursery school authorities. It was held that the education society was held liable for negligence.

C. MANUFACTURER'S NEGLIGENCE AND HIS LIABILITY:

I. NEGLIGENCE OF MANUFACATUER:

i. A manufacturer is liable for negligence in the **production, design, or assembly** of the manufacturer's product.

ii. An injured person can sue the negligent person, only if he was a **party to the transaction** with the injured

person. In other words, the defendant's duty of reasonable care arose, only if there is privity of contract between the defendant (manufacturer) and the plaintiff (user). But ***MacPherson v. Buick Motor Co.,*** **case** broadened the duty of care to all who could be foreseeably injured by one's conduct.

iii. The duty of care and supply of a safe product applies to everyone in the chain of distribution, including a manufacturer who carelessly makes a defective product.

II. LIABILITY OF MANUFACATUER:

The liability of manufacturer arises in the following cases:-

i. Negligence
ii. Strict liability
iii. Breach of warranty.

(i) Negligence:

The liability of the manufacturer arises due to the -

(a) Manufacturing defect of the product.

(b) Design defect, and /or

(c) Failure to warn (known as marketing defects).

(a) **Manufacturing defects** are those that occur in the manufacturing process and usually involve poor-quality materials or shoddy workmanship.

(b) **Design defects** occur where the product design is inherently dangerous or useless (and hence defective) no matter how carefully manufactured;

(c) **Failure-to-warn defects** arise in products that carry inherent nonobvious dangers which could be minimized through adequate warnings to the user.

(ii) Strict liability:

Under strict liability, the manufacturer is liable if the product is defective, even if the manufacturer was not negligent in making the product defective.

(iii) Breach of warranty:

Warranties are statements by a manufacturer or seller concerning a product during a commercial transaction. Breach of warranty-based product liability claims usually focus on one of three types:

i. breach of an express warranty,

ii. breach of an implied warranty of merchantability, and

iii. breach of an implied warranty of fitness for a particular purpose.

Donoghue Vs. Stevenson:

The leading case in manufacturer's negligence and liability is - *Donoghue Vs. Stevenson.* This is also known as ***Rule in Donoghue Vs. Stevenson.***

In a ginger beer bottle, the decomposed remains of a dead snail were found. The plaintiff drank the beer and became seriously ill.

The defendant namely the manufacturer of ginger beer contended that the plaintiff had to establish that the defendant owed to him a specific legal duty to take care. and he had breached the same.

In the instant case, the defendant owed no such duty to the plaintiff as there was no direct contract between the manufacturer and the consumer.

Rejecting the defendant's contention as untenable. the House of Lords held that the manufacturer of the ginger beer was liable, because of negligence. though there was no direct contractual duty to take care.

The following rules were laid down in this case:

1. There is **no general rule of law defining such duty.** It depends on each case whether such a duty exists or not.

2. The manufacturers of food products. medicines or other goods of this kind have **legal duty to their ultimate purchasers or consumers** to keep them free from such defects which are likely to cause any harm to their health.

3. **The duty to take care arises out of various relations,** which it may not be possible to enumerate exhaustively

and the Courts recognise new duties when they think that it is just.

PRINCIPLE OF NEIGHBOURHOOD:

4. The main rule enunciated in this case is 'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'.

The term 'neighbours' is not confined only to their place of stay near my residence, factory, etc.,

This really means that if persons (consumers in the above case) are so closely and directly affected by the defendant's act and that the defendant must reasonably keep the consumers in mind as by the acts or omissions of the defendant, they are the persons likely to be affected. This is called **neighbour's principle**.

The liability under the above stated rule in Donoghue Vs. Stevenson has not merely been limited only to the manufacturers of products, but it has been extended to include repairers, assemblers, builders and suppliers and so on. It has also been held to include erections - plant, building and machinery.

D. MEDICAL NEGLIGENCE AND LIABILITY:

(Refer Chapter 30 - Page No. 151)

E. BUILDER'S NEGLIGENCE AND LIABILITY:

i. The building construction professionals are liable to their clients and third parties for damage / loss caused by their professional's negligence. Thus, a builder of defective building is liable for negligence in the 'building collapse' as well as 'injuries' to persons.

ii. A designer or builder owes a duty of care to all persons who are reasonably expected to be affected by the design/construction of the building.

iii. Since the construction of the property is defective and damage has occurred, the purchaser is entitled to claim compensation for his losses, including loss of profit.

Muirhead v Industrial Tank Specialists Ltd and other (1986):

In this case, it was held that a claimant (e.g. a purchaser) could recover losses (e.g. damages) in tort from a third party (e.g. the builder), because the losses incurred were reasonably foreseeable.

(iv) In addition to an action under contract and under tort, defective premises actions may be brought under the **Defective Premises Act 1972.**

Essentials:

In order to establish a claim in negligence, it is necessary for a claimant to satisfy the following requirements:

i. The existence in law of a duty of care.

ii. Behaviour that falls below the standard of care imposed by law.

iii. A causal connection between the defendant's conduct and the damage

iv. Damage falling within the scope of the duty.

F. RES IPSA LOQUITUR:

It means, **'the accident speaks for itself'** so that it is sufficient for the plaintiff to prove the accident and nothing more i.e., need not prove the negligence, etc., of the defendant. Here, the accident itself constitutes reasonable evidence of negligence in the particular circumstances.

ESSENTIALS:

1. The thing which causes the harm must be under the control of the defendant.

2. While under his control, an accident must have happened.

3. The accident must be out of extra-ordinary course of act of the defendant.

4. The occurrence is such that it would have happened without negligence.

i. Byrne Vs. Boadle:

A barrel of flour rolled out of an open door way of the defendant's warehouse and fell on the plaintiff, a passer by in the street below. It was held that this was sufficient evidence of negligence on the part of the defendant that the accident had happened and hence held the defendant liable.

ii. Municipal Corporation of Delhi Vs. Sobhagwanti:

Due to the negligence on the part of the Delhi Corporation, an age-old Clock Tower collapsed and killed a number of persons. Held that the Corporation was negligent.

iii. Scott Vs. London St. Katherine Docks Co:

When a Customs Officer was passing near the door of the defendant's warehouse, he was injured by the fall of some bags of sugar. The defendant was held liable for negligence under Res Ispa Loquitur.

iv. MC. Gowan Vs. Scott:

A pedestrian (plaintiff) was knocked down from behind by the defendant's motorcar, when he was walking on the pavement. As it was a case of negligence, the defendant was liable.

G. DEFENCES FOR NEGLIGENCE:

There are **three** defences available to the defendant against an action for negligence. They are:

1. Vis Major or Act of God

2. Inevitable Accident

3. Contributory negligence

1. Vis Major or Act of God:

If, by supernatural power like lighting, flood, etc., something escapes and causes damage, the defendant is not liable.

2. Inevitable Accident:

If the injury or loss is due to unavoidable circumstances beyond the human control, then for such injuries a person cannot be sued under the tort of negligence.

For e.g.: Dust falling in the eyes of a driver and subsequently resulting in an accident, dashing with one another in a crowded area.

3. Contributory Negligence:

(Please refer Chapter No. 29, Page No. 144)

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Distinguish between Negligence and Nuisance.*
2. *When is a manufacturer liable to the customer for negligence? Explain with illustrations.*

3. *Explain the concept of the "duty of care" to a neighbour as laid down in Donoughue Vs. Stevenson.*
4. *Define Negligence. What constitutes an act of contributory negligence?*
5. *Outline the conditions for the application of the maxim "Res Ipsa Loquitur".*
6. *Discuss the liability under negligence of:-*
   (a) Manufacturers
   (b) Doctors
   (c) Builders.

29. CONTRIBUTORY NEGLIGENCE

(IMPORTANT)

SYNOPSIS:

A. Introduction

B. Burden of proof of Contributory Negligence

C. Exceptions to contributory Negligence

D. Recent Developments - Comparative Negligence

E. Composite negligence

A. INTRODUCTION:

Contributory negligence is the negligence in not avoiding the consequences of negligence of some other person. When the plaintiff by his own want of care, contributes to the damage caused by the negligence of the defendant, then he is guilty of contributory negligence. The person committing contributory negligence must have the opportunity and means to avoid such consequence.

Contributory negligence is an exception to the tort of negligence. If the affected party is also negligent, then the first wrongdoer (the first negligent person) can raise the defence of contributory negligence on the part of the plaintiff.

For e.g.: A man keeping his hands outside the window of a running bus cannot sue the driver for negligence of his injuries because he is also contributory negligent.

Crossing the Railway line when the gate is closed, traveling in the food board are other instances of contributory negligence.

B. BURDEN OF PROOF OF CONTRIBUTORY NEGLIGENCE:

1. The defendant must first prove that there was contributory negligence on the part of the plaintiff.

2. If the defendant cannot prove such contributory negligence of the plaintiff, then the Court will presume that there is no contributory negligence and will make the defendant liable.

Law Report Contributory Negligence Act, 1945:

It provides that if the injured party is contributorily negligent, then the case will not be dismissed, but the compensation will be proportionately reduced.

i. Bates Vs. Great Central Railway:

A Police Constable entered into an open warehouse after darkness. He fell down and injured himself in an unfenced pit.

The Court held that he was contributorily negligent, because he had no legal right to enter inside the warehouse. Therefore, he could not claim compensation.

ii. Kerry Vs. Keighy:

The plaintiff stepped backwards assuming that the lift was present behind him. He opened the lift door and without seeing behind, he stepped inside the lift. Since the lift was not there, he fell down and was injured. The Court held that he was contributorily negligent, and hence could not claim compensation.

iii. Hans Raj Vs. Tram Way Company:

The plaintiff attempted to get into a moving tramcar. While doing so, he fell down and was injured. The Court held that he could not claim compensation, as he was contributorily negligent.

C. EXCEPTIONS TO CONTRIBUTORY NEGLIGENCE: (PLAINTIFF'S CONTRIBUTORY NEGLIGENCE IS NOT A DEFENCE TO THE DEFENDANT)

In the following cases, the defence of the defendant that the plaintiff is contributory negligent is not valid.

In other words, contributory negligence on the part of the plaintiff is not a defence to the defendant. It means defendant is fully liable for negligence and there is no contributory negligence on the part of the plaintiff.

1. If the plaintiff has the **right to assume that the defendant woul d not be negligent**, then he need not take much care or caution. So, he is not contributorily negligent. For e.g.: A man driving a car on a main road may presume that the road is safe for travel.

Butterfield Vs. Forrester:

The plaintiff was riding his motor cycle at high speed at dusk. He collided with a pole placed by the defendant across the road.

The Court held that the defendant was not negligent, because there was sufficient light to avoid the accident. So, there was contributory negligence, and assumption of the plaintiff was wrong.

2. If the defendant had **the last opportunity to avoid the accident**, then the contributory negligence of the plaintiff is not a defence.

For e.g., if a fast driving car driver had the last opportunity to avoid the accident, then the other person (plaintiff) was not contributory negligent. This is known as **'last opportunity rule'**.

i. Davis Vs. Mann:

The plaintiff negligently left his donkey with the legs tied in a narrow street. The defendant negligently ran over the donkey. The defendants contended that the plaintiff could claim compensation, because the defendant had the last opportunity to avoid the accident.

ii. British Columbia Electric Co., Vs. Loach:

The driver of a wagon negligently brought the wagon on the level crossing of the defendant's tramline without

seeing whether any tram was coming on the line. A tram with defective brakes driven too fast caused the collision and in the process the passenger in the wagon got injured.

The Court held that the tram company could not take the defence of contributory negligence, because they had the last opportunity to avoid the accident, but because of the defective brakes, he could not stop the tram.

3. **Doctrine of alternative dangers:** If the defendant has **placed the plaintiff in extreme peril of two or more dangers**, then the defendant is liable for negligence. Here the plaintiff should have acted reasonably to face the peril, because of the principle of alternative dangers.

Brandon Vs. Osborne:

A skylight was about to fall on the plaintiff's husband. To save him, his wife pulled him off. In doing so, she injured her leg. The Court held that there was no contributory negligence.

4. The doctrine of contributory negligence will not apply to **maritime cases**.

5. The doctrine of contributory negligence will not apply to **children**. So, even if a child is negligent, the defendant cannot raise the defence of contributory negligence because they do not have sufficient mental maturity.

But if a child is under the custody of some adult member, then he must take sufficient care of the child. If the child is negligent and is injured, then it will be deemed that it is contributory negligent, and will not be entitled for any compensation. This is known as **doctrine of identification.**

D. RECENT DEVELOPMENTS - COMPARATIVE NEGLIGENCE:

It is also called **'Non-absolute contributory negligence'**. It is a partial legal defence of the defendant. It reduces the amount of compensation which a plaintiff can recover from the defendant in a negligence-based claim.

The ratio of reduction of compensation is based upon the degree of the plaintiff's own negligence, which contributed to the cause of the accident, i.e., the plaintiff's injuries.

When this defence is asserted by the defendant, the Court must decide the degree of the plaintiff's negligence and also the combined negligence of all other relevant factors that contributed to cause the plaintiff's injuries/ loss and accordingly, may reduce the compensation payable to the plaintiff. Thus, **comparative negligence** is a modification of the doctrine of contributory negligence which totally disallows any recovery of compensation by the plaintiff in case his (plaintiff's) negligence also (even minimal) caused the injuries/ loss.

E. COMPOSITE NEGLIGENCE:

Composite negligence refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers.

In such a case, each wrong doer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately. It is not necessary for the court also to determine the extent of liability of each wrong-doer separately.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss the doctrine of "Contributory negligence" and state the exceptions if any.*
2. *(a) Explain what is meant by contributory negligence.*
   (b) How does it affect the right of person to recover damages for injuries sustained by him due to negligence of another? Is there any difference between English and Indian law on the matter?
3. *Define contributory Negligence? Examine the recent changes in the doctrine.*
4. *What is contributory negligence? Are the general rules governing contributory negligence applicable in the case of children.*

30. MEDICAL NEGLIGENCE (OR) NEGLICENCE OF DOCTOR

SYNOPSIS:

A. Introduction

B. Medical Profession as Service

C. Supreme Court's Rulings

D. Categorisation of Medical practitioners and Hospitals

E. Medical Negligence or Negligene of doctor

F. Conclusion

A. INTRODUCTION:

Whether a medical negligence is a negligence actionable under law of tort or not was a much debated question till November 13th 1995.

But the Supreme Court passed the judgement on November 13th 1995 in the famous case ***Indian Medical Association Vs. V.P. Shantha and others*** held that for medical negligence, there can be claim for compensation under the Consumer Protection Act.

Thus medical profession came to be included under the term 'service' in Consumer Protection Act.

B. MEDICAL PROFESSION AS SERVICE:

DEFINITION OF SERVICE:

It means 'service' of any description which is made available to the potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both (housing and construction), entertainment, amusement or the purveying of news or other information but does not include the rendering of any service **free of charge or under a contract of personal service.**

The contention of medical professionals was that the medical professionals are not engaged in occupation rendering service which is covered under Sec. 2 (1) (o) and that theirs is a profession and not covered by the provision of the Consumer Protection Act.

They argued that their practice was subject to the provisions of the Indian Medical Councils Act and the ethics made by the Medical Council of India, approved by the Government of India. They contended that their conduct is already regulated by the rules under the Indian Medical Council.

C. SUPREME COURT'S RULINGS:

The Supreme Court decided and passed the ruling on November 13th 1995, in ***Indian Medical Association Vs. V. P. Shantha and others*** as follows:

i. Service rendered to a patient by a medical practitioner (except where the Doctor renders service free of charge to every patient or under a contract of personal service) by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service'.

ii. Service rendered free of charge by a medical practitioner attached to a Hospital/Nursing Home where such services are free of charge to everybody is not 'service'.

iii. If charges are paid by the persons in such services, then it is not covered under of 'service'.

iv. If a Non-Government Hospital/Nursing Home renders free service for some patients as well as service for payment for some patients, it is covered under of 'service'.

v. Complete 'Free Service' rendered for all patients by a Government Hospital/Health Control/Dispensary is not covered in 'service'.

If such Government Hospital/Health Centre/ Dispensary renders service for payment as well as free service, it is covered under 'service'.

D. CATEGORISATION OF MEDICAL PRACTITIONERS AND HOSPITALS:

According to the Supreme Court's Rulings, medical practitioners and hospitals are categorised as:

1. Services rendered free of charge to every body availing such services.

2. Services rendered by collecting charges from everybody availing the services.

3. Service rendered free of charge for certain category of persons who cannot pay, and service rendered by collecting charges from some category of persons who can pay.

Regarding point No. 1, they are not included under the service and hence for any medical negligence on the part of the Doctor or Hospital, Nursing Home, etc., rendering service free of charge, they cannot be held liable for loss or injury, as there is no consideration between the Doctor and the patient.

Regarding the point No.2, where charges are paid by everybody availing the services, the Doctors and Hospitals rendering such services are held liable for medical negligence.

Regarding the point No. 3, where charges are paid by some and not paid by those who cannot, the Doctors and Hospitals rendering such services are held liable for medical negligence. But as the consumers are treated as a class, and if there is difference in treatment within the same hospital between a paid patient and unpaid patient as to the mode of diagnosis, medication, etc., it is not justified.

Though the Government Hospitals may not be commercially motivated, they cannot be treated differently and hence if they render free of charge service to some and service for charge for some, they are liable for medical negligence covered under the Act.

E. MEDICAL NEGLIGENCE OR NEGLIGENE OF DOCTOR:

In treating a medical case, a doctor is expected to exercise that degree of care and skill which would be used by a reasonable and prudent doctor in the same or similar circumstances.

It is not sufficient to establish legal responsibility that injury followed negligence but it must also be shown that the negligence was sufficiently related to the ultimate damage and that, as a matter of public policy, liability should be imposed.

Professional negligence or medical negligence is defined as want of reasonable degree of care and skill or willful negligence on the part of the medical practitioner in the treatment of a patient with whom a relationship of professional attendant is established, so as to lead to his bodily injury or to the loss of his life.

POINTS EVOLVED FROM DECIDED CASE LAWS:

1. Negligence must be shown to be the cause of the ultimate injury. The following chain should be there - existence of duty – standard of care – breach of duty – injury –

casual connection between breach of duty and ultimate injury – the measure of damages.

2. Negligence on the part of the physician must be proved to attach liability and get compensatory remedy.

3. If there is no material evidence on record, allegation of medical negligence will not be entertained.

Akhil Bhartiya Panchayat Vs. Dr. Jog Hospital:

The complainant was operated upon 10 years ago at Ahmedabad for some ailment. She could not prove that her pain increased after the operation, and there had been negligence on the part of the Doctor. The Court held that she could not claim any compensation.

4. Undue delay on the part of the Doctor should be proved.

In Md. Aslam Vs. Ideal Nursing Home and other:

The complainant contended that his deceased wife was not given immediate treatment and adequate care, as a result of which she died. He complained that though operation was an emergent one, there had been a delay of four hours, and hence alleged that there had been negligence.

But the Court held that since blood and other arrangements had to be made, a delay of four hours was not abnormal in this case, and there had been no negligence on the part of the Doctors or the Nursing Home.

5. If the technique of treatment is a well-recognised one, the Doctor is not guilty of negligence or deficiency of service.

   The injury is not negligence, simply because one of the risks inherent in an operation actually took place or because in the matter of opinion, he made an error of judgment. He is guilty only when he has not exercised the standard of reasonable medical care.

6. The term 'medical profession' includes para medical services like blood bank, druggists, etc.

   Haresh Kumar Vs. Sunil Blood Bank:

   The blood purchased from blood bank had failed to test the blood before storing and caused discomfort to the complainant and his wife. The Court held that the defendant was liable to pay compensation.

7. Misrepresentation by a Doctor that he possesses the skill or expertise which he does not possess is negligence and for any loss or injury, compensation is awarded.

   E.g.: Amputating a wrong limb, giving allergic medicines, wrong diagnosis which cannot be justified, etc. If an unqualified person attends to a serious case which cannot be handled by him, he is considered negligent.

8. If excessive billing or charges are levied for which no service was performed, it is considered as deficiency of service and the Hospital has to refund the same to the complainant.

9. Post operative care and follow up is as essential as the surgery itself. If a doctor performs surgery and does not show responsible care after surgery, it is deficiency in service and he is liable for damages.

F. CONCLUSION:

The liability of medical practitioners and hospitals is not new, as they are already liable under the civil and criminal penal laws. All the principles governing civil liability on negligence also applies to medical negligence.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *State the provisions as to how the medical services were included under the wing of the Consumer Protection Act.*
2. *Can the Consumer Protection be extended to medical services? Discuss.*
3. *Explain the concept of medical negligence which make doctors liable under the Act.*

31. LIABILITY OF COMMON CARRIER FOR NEGLIGENCE (THE CARRIERS ACT, 1865)

SYNOPSIS:

A. Common Carriers
B. Rights of a common carrier
C. Duties of a common carrier
D. Liabilities of a common carrier
E. Private Carriers
F. Gratuitous Carrier
G. Responsibility of Common Carrier and Bailee
H. Conditions limiting exonerating the liability of the common carrier

A. COMMON CARRIERS:

The Carriers Act, 1865 defines a common carrier as any individual, firm or company (other than the government, who or which transports goods as a business, for money, from place to place, over land or inland waterways, for all persons (consignors) without any discrimination between them.

A carrier must carry goods of the consignor for hire and not free of charge in order to be called a common carrier. Further, he must be engaged in the business of carrying goods for others for money from one place to another.

A person who carries goods occasionally or free of charge is not a common carrier. Further, he is bound to carry goods for all persons (consignors) without any discrimination provided:

i) the freight chargeable by him is paid to him;

ii) there is accommodation on his conveyance; and

iii) there is nothing objectionable or illegal about the carrying of goods of a particular consignor.

If, in spite of the above conditions being satisfied, a carrier reserves to himself the right to accept or reject an offer, he is not a common carrier. It is worth noting that the Carriers Act, 1865 covers only common carriers of goods and not passengers.

B. RIGHTS OF A COMMON CARRIER:

i) He is entitled to the settled remuneration and in case no remuneration was settled, to a reasonable remuneration.

ii) He has a right to refuse to carry goods under certain circumstances (as enumerated under the duties of a common carrier).

iii) He has a lien on the goods for his remuneration. He can refuse to deliver them until his charges are paid.

iv) If the consignee refuses to take delivery of the goods, when tendered, the common carrier has a right, to deal with the goods as he thinks reasonable and prudent under the circumstances.

v) He has a right to recover reasonable expenses incurred by him as a result of the consignee's refusal to take delivery. After giving notice to the consignee, the common carrier may even sell perishable goods.

vi) He can recover damages from the consignor if the goods are dangerous or are loosely packed and the carrier suffers injury therefrom.

vii) He can limit his liability subject to the provisions of the Carriers Act.

C. DUTIES OF A COMMON CARRIER:

1. A common carrier is bound to carry goods of all persons who choose to employ him. He can, however, refuse to carry goods under the following circumstances:

(a) if there is no accommodation in the carriage;

(b) if the person employing him is not willing to pay reasonable charges for the carriage of goods;

c) if the goods are such which he is not accustomed to cany;

d) if the goods are to be carried over a route which is not his regular route;

e) if the goods are-dangerous and as such subjecting him to extraordinary risk;

f) if the consignor refuses to disclose the nature of the goods to be carried; and

g) if the goods are not properly packed.

If a carrier refuses to carry the goods of a person for any reason other than those mentioned above, he may be held liable for damages.

2. He must carry the goods over the usual and customary route and take all reasonable precautions for their safe carriage. He must not deviate from the usual route unless rendered necessary by exceptional circumstances.

3. He must deliver the goods at the agreed time and if no time had been fixed, within a reasonable time.

4. At Common Law, he is an insurer of the goods in the sense that he warrants to carry the goods safely and securely.

D. LIABILITIES OF A COMMON CARRIER:

The liability of a common carrier of goods is laid down in the Carriers Act, 1865. For this purpose, the Act has classified the goods into two categories:

(i) Scheduled goods and (ii) non-scheduled goods.

The scheduled goods are those which are enumerated in a Schedule to the Act. They are valuable articles like gold, silver, precious stones and pearls, bills and hundis, currency and bank notes, glass, china silk, articles of ivory, time pieces, musical and scientific instruments, etc. All other goods are non-scheduled.

For scheduled articles exceeding Rs.100 in value, the carrier is liable for loss and damage only:

i) if the value and the description of the goods are disclosed by the consignor to the carrier; or

ii) if the loss or damage is due to a criminal act of the carrier, his agent or servant.

The carrier can charge extra for carrying scheduled articles, but he cannot limit his statutory liability by any special agreement. As regards non-scheduled articles, a common carrier can limit his liability by special agreement with the consignor. But even in this Section case he will be liable under 8 of the Act (explained below).

In case of loss or damage, the claimant must notify the carrier within six months of the date of knowledge of the loss or damage.

E. PRIVATE CARRIERS:

A private carrier is one who does not transport goods from one place to another regularly; he may engage in some casual jobs of carrying goods for certain selected persons between certain terminals. In fact, he carries his own goods and that's why he is known as a private carrier and not a common carrier.

Also, he does not make a general offer to carry goods for any one from one place to another for hire. However, he may enter into a contract with someone to carry goods on

the terms agreed upon between them. In such a situation, it is a contract of bailment. Therefore, such transactions are not covered by the Common Carriers Act, 1865.

F. GRATUITOUS CARRIER:

When a person carries goods of another free of charge, he is a gratuitous carrier. Similarly a person may give lift in his transport to another person voluntarily without any compensation. Thus a gratuitous carrier may carry not only goods but persons also free of charge.

G. RESPONSIBILITY OF COMMON CARRIER AND BAILEE:

We know that a bailee is responsible only when the goods entrusted to him are lost or damaged due to his **fault or negligence**. But the responsibility of a common carrier is more onerous; he is to deliver the goods safely. Therefore, in the case of a common carrier, it is immaterial whether the loss or damage to the goods is due to his or someone else's negligence.

H. CONDITIONS LIMITING EXONERATING THE LIABILITY OF THE COMMON CARRIER:

1) Every common carrier shall be liable to the consignor for the loss or damage to any consignment in accordance with the goods forwarding note, where such loss or damage has arisen on account of any criminal act of the common carrier, or any of his servants or agents.

2) In any suit brought against the common carrier for the loss, damage or non-delivery of consignment, it shall

not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the common carrier, or any of his servants or agents.

3) If any consignment has been detained for examination or scrutiny by a competent authority and upon such examination or scrutiny it is found that certain prohibited goods or goods on which due tax was not paid or insufficiently paid have been entrusted to the common carrier by the consignor which have not been described in the goods forwarding note, the cost of such examination or scrutiny is borne by the consignor and the common carrier is not liable for any loss, damage or deterioration caused by such detention of the consignment for examination or scrutiny:

However, the onus of proving that such incorrect description of goods in the goods forwarding note was received from the consignor is on the common carrier.

Patel Roadways Ltd. v. Birla Yamaha Ltd (2000)

The Supreme Court held that in a suit against the common **carrier** for loss/damages or non-delivery of articles or goods entrusted to the **carrier,** he is not required to prove **negligence**.

The reason is that the **liability** of a...**carrier** is also an insurer under general law, and therefore, even keeping aside the provision of section 9 of the C arriers Act, the **liability** for

making good the loss of the goods in its custody squarely lies on the **carrier**.

Nath Bros. Exim International Ltd. v. Best Roadways Ltd. (2000):

The Supreme Court held that even if the goods were carried at 'owner's risk', the carrier is not absolved from his liability for loss of or damage to the goods due to his negligence or criminal acts.

Indian Airlines Corporation v. Jothaji Maniram, AIR 1959 Mad 285:

The Madras High Court held that the petitioner was a common carrier, and as a common carrier was liable for the loss of the goods occasioned by its negligence.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the salient provisions of Carriers Act,—, with special reference to the liability of a carrier for his negligence resulting in damage or loss to goods.*
2. *When is the carrier liable for negligence resulting in damage or loss to goods to the consignor of goods?*
3. *Write Short on: a) Liability of common carrier for negligence b) Duties of common carrier c) Libilities of common carrier.*

32. ENVIRONMENTAL POLLUTION AND REMEDIES UNDER TORT (ENVIRONMENTAL TORTS)

SYNOPSIS:

A. Environmental Law

B. Environmental Torts

C. Difference between Environmental Law and Environmental Torts

D. Law of Torts and Environmental Pollution

E. Conclusion

A. ENVIRONMENTAL LAW

Environmental law is also known as environmental and natural resources law. It is a collective term describing the group of treaties, statutes, regulations, common and customary laws stating the effects of human activities on the natural environment.

The main function of environmental law is to prevent environmental pollution, punish the violators and provide remedies for the victims of pollution. According to Section 2(a) of the Environmental Protection Act, 1986, the main objective is

- to Improve the Quality of Environment,

- to lay down standards for emission or discharge of environmental pollutants from various sources,

- to restrict the areas in which any industry, operations or processes shall be carried out,

- to regulate the handling of hazardous substances.

- to lay down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents and

- to deterrent punishment to persons who endanger the human environment, safety and health.

B. ENVIRONMENTAL TORTS

Law of Torts focus on bad outcomes affecting persons (both human beings and corporations) and property. It is a civil wrong with a remedy of unliquidated damages(compensation)

In cases of environment, the law of torts plays a role when there is environmental damage. It is more concerned with cure(remedies) rather than prevention. It is concerned primarily with reparation (compensation)and not punishment. It is one of the remedies for environmental pollution.

C. DIFFERENCE BETWEEN ENVIRONMENTAL LAW AND ENVIRONMENTAL TORTS:

1. Environmental law helps to protect public health from environmental pollution etc., while environmental torts

is to remedy the loss/ damage/ injuries caused to individual human beings by environmental pollution etc.,

2. Environmental law with respect to hazardous waste is that the burden of proof depends on the circumstances of a case. Whereas in torts, the plaintiff has the burden of showing that the defendant's action caused loss or damage.

3. Environmental law directly deals with pollution, but in Torts, only its principles spell out pollution control and remedies for violations. For eg., one of the important principles in tort is - "No one should use his property as to harm others". Thus tort indirectly dead with environmental pollution, etc.,

D. LAW OF TORTS AND ENVIRONMENTAL POLLUTION:

Majority of environment pollution cases of tort in India fall under four major categories:

I. Nuisance.

II. Trespass.

III. Negligence.

IV. Strict Liability.

I. NUISANCE:

It means anything which annoys, hurts or that which is offensive. Under the law of tort, nuisance is unlawful interference with the personal right over whole of land or of some right over or in connection with it. For an interference

to be an actionable nuisance, the conduct of the defendant must be unreasonable.

Nuisance may be public or private nuisance. Acts interfering with the comfort, health or safety are covered under nuisance.

The interference may be due to smell, noise, fumes, gas, heat, smoke, germs, vibrations, etc. In the private nuisance, the basis of an action under nuisance is unreasonable and unnecessary inconvenience caused by the use of the defendant's land.

A public nuisance is an unreasonable interference with a right common to the general public. It is an act or omission which materially affects the reasonable comfort, convenience, health, safety and quality of life of a class of persons.

The activities include carrying of trades causing offensive smells, intolerable noises, dust, vibrations, collection of wastes that affects the health or habitability in a locality.

CASE LAWS:

1) St. Helen Smelting Co. vs Tipping:

In this case, the fumes from the defendant's manufacturing work damaged plaintiff's trees and shrubs. The Court held that such damage was an injury to property which gave rise to a cause of action.

2) Dilaware Ltd. vs Westminister City Council:

In this case, the respondent was the owner of a tree growing in the footpath of a highway. The roots of the tree caused cracks in the neighboring building. The court held that the transferee of the building, after the cracks were detected, was entitled to recover reasonable remedial expenditure in respect of the entire damage from the continuing nuisance caused by the trees.

3) Ram Baj Singh vs Babu Lal:

In this case, A person built a brick grinding machine in front of the consulting chamber of a medical practitioner. The machine was generating a lot of dust and noise which polluted the atmosphere and entered the consulting chamber of the medical practitioner and caused physical inconvenience to him and his patients.

The Court held that this amounts to the private nuisance which has reasonably caused injury, discomfort or annoyance to a person. Exposure of unwilling persons to dangerous and disastrous levels of noise amounts to noise pollution. It is also known as noise nuisance and thus it can be controlled under the law of torts.

4) Free Legal Aid Cell vs Govt of NCT of Delhi:

As a result of display and use of fireworks during festivals and marriages, adults as well as children suffered physical and mental health hazard. Further, because of indiscriminate use of loudspeakers, noise pollution has

become a routine affair affecting mental as well as physical health of citizens and it causes a nuisance.

II. Negligence

Negligence is another specific tort on which a common law action to prevent environmental pollution can be instituted.

When there is a duty to take care and the same is not taken, which results in some harm to another person, it is amounted to negligence. In the action of negligence, the result must be a loss, inconvenience or annoyance to another. The plaintiff must show -

a) The the defendant was under a duty to take reasonable care to avoid the damage complained.

b) The loss or damage must have been caused by the breach of duty.

CASE LAWS:

1) Donoghue vs Stevenson:

In this case, a ginger beer bottle contained remains of a snail. Donoghue drank the drink and suffered from nervous shock and gastroenteritis. Donoghue claimed damages against the manufacturer of the ginger beer

The Court held the case in favor of Donoghue, and said that a duty owed by the manufacturer to the ultimate consumer.

2) Nichols v. Marsland:

In this case, The defendant had a series of artificial lakes on his land in the construction or maintenance of which there had been no negligence. Owing to exceptionally heavy rain, some of the reservoirs burst and carried away four country bridges.

It was held that the defendant was not liable as the water escaped by the act of God.

3) Naresh Dutt Tyagi vs State of UP:

In this case, Chemical pesticides were stored in godown in a residential area. Fumes emanating from the pesticides leaked through ventilators which resulted in the death of 3 children and an infant in the womb of the mother. It was held that it was a clear case of negligence.

4) Municipal Board, Jaunpur vs Brahm Kishor:

In this case, the defendants (Municipal Authorities) had dug a ditch on a public road for repairs. The plaintiff who was going on a cycle in the evening to his quarters from the club did not see the ditch in the darkness, and fell into it and was injured.

The municipal authorities had not given any public notice about this, and not provided light, danger signal, caution notice or barricade, etc. to prevent such accidents.

The court held that the accident occurred due to the negligence of the defendants (Municipal Authorities) and

therefore they were liable. It was their duty to give proper notice and provide light to the passerby on the road which they did not comply.

III. TRESPASS:

It means an intentional invasion of the interests of the plaintiff over the property in his exclusive possession. The invasion may be direct or through some visible object. Two things are necessary to prove for constituting the tort of trespass.

a) Intentional interference.

b) Such interference must be direct.

It differs from the nuisance in that, trespass is actionable per se whereas nuisance is actionable on the proof of damage.

In the environment related problems tort of trespass constitutes a deliberate placement of waste. It includes gases or even invisible fumes. The remedies for these environmental torts are claim for unliquidated damages and injunction or both.

An injunction is a judicial process where a person who has infringed or is about to infringe the rights of another, is restrained from pursuing such acts. Injunctions are of two kinds, temporary or perpetual.

ILLUSTRATION:

A person deliberately sprays pesticides or dumps waste on another man's property. The interference must be deliberate. For example, if pesticides accidentally blow onto another man's land, it does not constitute trespass.

CASE LAWS

1) Giffort Vs. Dent:

The tenant of the upper floor of a building affixed an ornamental sign board in his premises. It projected over the land occupied by another tenant. The Court held that there was trespass and hence the plaintiff could get compensation, eventhough the plaintiff suffered no loss.

2) Vaux Vs. Newman: (Six Carpenters Case):

Six carpenters entered the inn of the plaintiff, ordered for wine and drank it. They refused to pay the bill. The innkeeper brought an action for trespass against the six carpenters.

The Court held that refusal to payment of bill does not amount to trespass, because their entry inside the inn was lawful and hence they could not be treated as trespassers ab initio.

3) Sorrel Vs. Paget:

The plaintiff's cow entered into the defendant's land and destroyed some properties. The defendant detained the cow and it died. The plaintiff sued for compensation under

the tort of conversion. The Court held that the defendant was not liable, because he had a right to detain the cow till compensation was paid to him.

IV. Strict Liability

If a owner of a land or premises or industry keeps any dangerous or hazardous things in the property, then he must use his property in such a way that it should not cause any loss or damage or injuries to others.

If it causes loss etc., then even in the absence of negligence on the part of the owner/ his agent, still the owner is liable. This called Absolute liability or strict liability.

The owner is liable for the escape of anything dangerous things like beasts, hi water, filth, stench, electricity, traction engine or even a motorcar with petrol in it. In all such cases, the liability of the occupier is absolute.

CASE LAWS:

1) Rylands Vs. Fletcher:

Fletcher was a lessee of the coalmine. Rylands constructed reservoir on the neighboring land of the coalmine to supply water to his mill. There were old disused shafts under the reservoir, which communicated with the coal mine. The water flooded to coal mine and damaged it.

The Court held that Rylands was liable for the escape of water even in the absence of negligence. (Non-natural use of the land will also come under Absolute liability).

2) *Rule in M.C. Mehta vs. Union of India:*

The Supreme Court held that any enterprise or industry engaged in dangerous (hazardous) activity is strictly and absolutely liable to compensate persons affected by any harm or accident caused by it. The enterprise cannot escape by showing that there was no negligence.

3) *Charing Cross Electric Supply Co. vs. Hydraulic Power Co.*

In this case, the defendants' duty was to supply water for industrial works. Even without any proof of negligence, there was bursting of the pipeline at four different places resulting in heavy damage to the plaintiff which was proved with evidence. The defendants were held liable in spite of no fault of theirs.

4) *M.C. Mehta vs UOI:*

In this case, Shriram Food and Fertilizer Industry was engaged in the manufacture of the dangerous chemical. Large amounts of oleum gas leaked from one of the units in Delhi which resulted in the death of several persons.

The District Magistrate, Delhi ordered Shriram to stop the manufacturing and processing of hazardous chemicals and fertilizers at their establishment in Delhi and to remove such chemicals and gases from Delhi.

At this particular point, M.C. Mehta moved to Supreme Court to file PIL and claim for compensation for the losses

caused and also demanded that the closed establishment should not restart.

The Supreme Court held that Shriram is subject to extensive environment regulation under the Water (Prevention and Control of Pollution) Act, 1974 and as the factory is situated in an air pollution control area, it is also subject to the regulation of the Air (Prevention and Control of Pollution) Act, 1981. It awarded huge compensation to the victims.

5) Smt Selvi vs State of Tamilnadu:

In this case , a child died after falling into the sewage line left open due to the improper maintenance of the manhole by metro water supply and sewerage board. Board was held liable to pay compensation for the death of child.

E. CONCLUSION:

The powers vested to the Pollution Control Boards are not enough to prevent pollution. The Boards do not have power to punish the violators. They have to launch prosecution against them in the Courts which ultimately defeat the purpose and object of the Environmental Laws due to long delays in deciding the cases.

Therefore, the remedies available for environment problems under the law of torts is a boon to the victims who can directly approach court and get remedies.

UNIVERSITY QUESTIONS FOR REVIEW:

1) *Explain the role of law of torts in regulating environmental protection and remedying the victims.*

2) *Explain environmental law and its relationship with environmental torts.*

3) *What are the remedies available under the law of torts for loss or damage due to environmental pollution ?*

4) *Write short note on- a)Environmental tort b) Types of environmental torts. c) Remedies under tort for loss or damage under environmental pollution.*

33. NUISANCE (PUBLIC AND PRIVATE)

(MOST IMPORTANT)

SYNOPSIS:

A. *Introduction*

B. *Essentials of nuisance*

C. *Types of nuisance*

D. *Differences between Private and Public Nuisance*

E. *Difference between Nuisance and Trespass*

F. *Difference between Nuisance and Prescription*

E. *Defences To Nuisance*

A. INTRODUCTION:

Nuisance generally means **'to do hurt or to annoy'**. Blackstone says that it is done by one man to another man's enjoyment of his own property.

Nuisance is defined as 'anything done to the hurt or annoyance of the land, tenements of another and not amounting to a trespass'.

WINFIELD'S DEFINITION:

'An unlawful interference with a person's use or enjoyment of land or of some right over land or in connection with it'.

B. ESSENTIALS OF NUISANCE:

1. Unlawful interference with a person's use of land or
2. Unlawful interference with enjoyment of land or
3. Enjoyment of some right over land or
4. In connection with it

C. TYPES OF NUISANCE:

1. Public Nuisance or General Nuisance
2. Private Nuisance or Common Nuisance

1. PUBLIC NUISANCE:

Public Nuisance is an act or omission of an act causing common injuries, danger or annoyance to the public. It may be also to dwelling property. But in all cases, it must necessarily cause injury, obstruction, danger or annoyance to person using public places or ways.

For e.g. obstructing a highway, keeping common gaming house, or disorderly inn, brothel keeping, etc.

The public nuisance may also endanger the safety, comfort, and health of the public in general. Public nuisance is also a crime and so punishable as an offence.

i. *Harrold Vs. Watney:*

A four old child while climbing a defective fence in a high way fell down and was injured.

The Court held that the defendant was liable to pay compensation, because it was a public nuisance.

ii. Soltau Vs. De held:

The plaintiff was a resident in a house near a Roman Catholic chapel. The chapel bell was rung at all times during day and night.

The Court held that that it was a public nuisance. But to the plaintiff, it was a private nuisance because it created special damage to him and hence the plaintiff was entitled to an injunction.

If an act is authorised by law or statute, then it is not a nuisance. For e.g., the railway lines near residential areas produce noise, but since they are authorised, it is not actionable.

iii. Dwyer Vs. Mansfield:

The defendant was a licenced shopkeeper to sell vegetables and fruits. He sold potatoes when there was a potato scarcity. A queue of customers was formed and it obstructed the neighboring shops.

The neighbouring shopkeepers sued the shopkeeper for public nuisance. The Court held that it was not a nuisance since distribution of food was essential for the public.

Right of private individuals to sue for public nuisance:

Generally, a private individual cannot sue for public nuisance. But if the following three conditions are satisfied,

then private individuals can maintain a suit for public nuisance:

i. The plaintiff must have suffered **special damage**. It must be greater than that of the damage suffered by the rest of the public.

ii. The injury or loss to the plaintiff must be **direct and natural**.

iii. The injury or loss to the plaintiff must be **substantial**, not negligible. Only if the above three essentials are satisfied, the private individual can sue for public nuisance.

Remedies for public nuisance:

i. A Civil action can be maintained by Collectors or Advocate General or two or more persons getting his sanction.

ii. Criminal action can also be taken under the IPC and Cr.P.C., as public nuisance is an offence.

iii. If any person suffers special damage, civil right of action is available to him.

For e.g.: If a pit is dug in the middle of the public road, it may cause public nuisance, but no private individual

can sue for public nuisance. However, if a person is injured by falling into it, he can sue for tort.

2. Private Nuisance:

Private Nuisance is the unauthorised use of man's own property causing damage to the property of another. It is also the unauthorised interference with the property rights of another.

It does not amount to trespass. Obstructions of light, air, wrongful escape of gases, smoke etc., are examples of private nuisance.

Types of private nuisance:

The private nuisance is divided into **two** types:

(a) Nuisance to property (b) Nuisance to physical comfort

a. Nuisance to property:

Some damage or loss of the property must be proved for an action in tort of nuisance.z

i. Struges Vs. Bridgman:

The Court observed that what a nuisance is in one locality need not be nuisance in another locality. For e.g., a Rice mill in business area is not a nuisance, but if it is situated in a residential area, then it is a nuisance.

ii. Hollywood Siver Farm Ltd Vs. Emmett:

The plaintiff carried on the breeding of silver foxes business. The defendant, a neighbour, intentionally produced noise by explosion of guns to disturb the breeding. The plaintiff sued for injunction. The Court held that it was a private nuisance and hence the plaintiff could get injunction.

iii. Christie Vs. Davie:

The defendant maliciously made noises with furniture and crockery to annoy the plaintiff who carried on music lessons. The Plaintiff sued the defendant for private nuisance and the Court restrained the defendant from making noises.

b. Nuisance to physical comfort:

If the defendant uses his land as to interfere with the physical comfort of other persons, then he commits private nuisance.

For e.g.: Waste water flow, heaping of thorns, etc., obstruction of light, pollution of water or air, noise, etc. The damage must be substantial and not merely a small inconvenience.

i. Andrac Vs. Selfredge & Co.,:

Unreasonable demolition and construction of buildings caused the plaintiff's hotel with full of dust and noise. The plaintiff could claim damages from the defendant.

ii. Webb Vs. Barker:

The defendants were carrying on building operations during the night, thereby causing physical discomfort to the neighbour (plaintiff). An injunction was granted in order to restrain the defendant from carrying on the work.

Remedies for private nuisance:

They are three remedies available to be injured persons. They are:

1. Abatement 2. Damages 3. Injunction

1. Abatement:

It is the removal of the nuisance by the injured party. The removal must be done peacefully without any injury. For e.g., cutting the 'over hanging branches' of a mango tree, which protrudes into one's garden.

2. Damages:

If the injured party has suffered substantial damage, then he can also claim compensation. The cause of action of nuisance arises day to day and hence it is termed ***'de die in diem'.***

3. Injunction:

If compensation is not an adequate remedy, then the injured party can claim injunction. Injunction is an order of Court to the defendant to do or not do a specific act.

D. DIFFERENCES BETWEEN PRIVATE NUISANCE AND PUBLIC NUISANCE:

PRIVATE NUISANCE	PUBLIC NUISANCE
1. It affects only one person or a group of persons.	1. It affects the public at large.
2. It is the violation of private right of comfortable occupation of property.	2. It is an offence against right, safety and convenience.
3. A private individual can sue and get remedies.	3. A private individual cannot sue without the proof of special damages.
4. Private nuisance may be legalised by length of time.	4. Public nuisance cannot be legalised with any length of time.
5. It may be abated.	5. It cannot be abated.
6. The remedies for private nuisance are abatement, injunction and damages.	6. The remedies for public nuisance are declaration and injunction.

E. DIFFERENCE BETWEEN NUISANCE AND TRESPASS:

NUISANCE	TRESPASS
1. The interference is not direct but consequential. E.g., to plant a tree in his own land but allow its roots or branches to spread into or over the land of another person is nuisance.	1. There is direct physical interference with the plaintiff's possession of land through some materials or tangible objects. E.g., to plant a tree on another's land is trespass.
2. It is not tangible or material (e.g.,) interference by vibration, noise, smell, electricity or smoke.	2. Interference is by some material or tangible object.
3. Not actionable per se; (proof of damage is required).	3. Actionable per se (proof of damage for compensation is not needed).

F. DIFFERENCE BETWEEN NUISANCE AND PRESCRIPTION:

1. Nuisance is defined as 'anything done to the hurt or annoyance of the land, tenements of another and not amounting to a trespass'. It is 'an unlawful interference with a person's use or enjoyment of land or of some right over land or in connection with it'.

Prescription means custom continued until it has the force of law. It also means getting a right or title through enjoyment or possession for a prolonged period (i.e., twenty years) in the manner prescribed.

2. The right to commit a private nuisance may be acquired by twenty years continuous use of nuisance with the knowledge of other party. There is no prescriptive right as regards public nuisance is concerned.

E. DEFENCES TO NUISANCE:

There are a number of defences which have been pleaded in an action for nuisance. But the Courts recognize some of the defences as valid defences and others have been rejected.

I. VALID DEFENCES:

1. Easement by Prescription:

If a person has continuously engaged in an activity on the land of another person for 20 years or more, he acquires a legal right by prescription, to continue the act there in future also.

A right to commit a private nuisance may be acquired as an easement if such nuisance has been peacefully and openly enjoyed as an easement and as of right, without interruption, and for 20 years.

If the nuisance has been authorized by the servient land owner for a period of 20 years, the nuisance becomes

legalized ab initio. The period of 20 years cannot commence to run until the act complained of begins to be a nuisance.

Sturges Vs Bridgman:

The defendant, a confectioner had a kitchen in the rear of his house. For over twenty years, confectionary he was pounding materials in his kitchen with large pestles and mortars. A physician the plaintiff was living in the adjacent house but the noise and vibrations created in the kitchen were not felt to be a nuisance during that period.

When the physician made a consulting room in the garden in the rear in his house and then for the first time, he felt that the noise and vibrations caused in the confectioner's kitchen were a nuisance and such sound interfered with his practice.

The Court granted an injunction against the confectioner, and his claim of prescriptive right to use mortars and pestles failed because interference had not been an actionable nuisance for the preceding period of 20 years. Nuisance began only when the consulting room was built by the physician at the end of the house.

2. Statutory Authority:

An act done under the authority of a statute is a complete defence. If nuisance is an incident authorized by a statute, then there is no liability. A railway company authorized to run railway trains on a track is not liable if, in spite of due care, the sparks from the engine set fire to the nearby property.

II. Invalid defences:

1. Nuisance due to acts of others:

The act of two or more persons, acting independently of each other, may cause nuisance. An action can be brought against anyone of them and it is no defence that the act of the defendant alone would not be a nuisance.

2. Public Good:

Even if an act is beneficial to the public in general, but if to same act is a nuisance to a particular plaintiff, there it is actionable.

3. Reasonable care:

Use of reasonable care to prevent nuisance is defence.

4. Plaintiff coming to nuisance:

It is no defence that the plaintiff himself came to the place of nuisance. A person cannot be expected to refrain from buying a land on which a nuisance already exists and the plaintiff can recover even if nuisance has been going on long before he went to that place. The maxim *volenti non fit injuria* cannot be applied in such a case.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Define Nuisance. Distinguish between Public and Private Nuisance.*
2. *Distinguish between Negligence and Nuisance.*
3. *Distinguish between Nuisance and Prescription.*
4. *Distinguish between Nuisance and Trespass.*

ABSOLUTE (STRICT) LIABILITY

This topic contains three sub chapters

A. RULE IN RYLANDS VS. FLETCHER
   (RULE IN M.C. MEHTA VS. UNION OF INDIA)
B. KEEPERS OF DANGEROUS ANIMALS
C. DUTIES AND LIABILITIES OF OCCUPIERS OF PREMISES

34. RULE IN RYLANDS VS. FLETCHER

RULE IN M.C. MEHTA VS. UNION OF INDIA) - STRICT LIABILITY

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction
B. Exceptions to the Rule in Rylands Vs. Fletcher
C. Rule in M.C. Mehta Vs. Union of India

A. INTRODUCTION:

Strict liability: It means liability without fault i.e., (without intention or negligence)

Generally a person is liable only for wrong done by him intentionally or by negligence. But in certain cases, the law holds a person liable for the harm done unintentionally and without negligence.

This is based on the maxim - ***Sic utere tuo ut a alienum non laedum*** meaning - 'every one must use his own things in such a way as not to do harm or damage to another'.

This form of liability was first formulated in the case of '***Rylands Vs. Fletcher***' or **'Rule of Strict liability'**.

The rule enunciated in this case is as follows:

If a person keeps any non natural thing in his hand, he keeps it at his peril. If it escapes and does any damage, even in the absence of negligence, he is liable for all the natural consequences and losses due to it escape. Precautions and care are not defence. This is known as absolute liability.

i. Rylands Vs. Fletcher:

Fletcher was a lessee of the coalmine. Rylands constructed reservoir on the neighboring land of the coalmine to supply water to his mill. There were old disused shafts under the reservoir, which communicated with the coal mine. The water flooded to coal mine and damaged it.

The Court held that Rylands was liable for the escape of water even in the absence of negligence. (Non-natural use of the land will also come under Absolute liability).

Thus the owner is liable for the escape of anything dangerous like beasts, water, filth, stench, electricity,

traction engine or even a motorcar with petrol in it. In all such cases, the liability of the occupier is absolute.

ii. Snow Vs. White-Head:

The defendant had put pipes in his house without connecting them to any drain, and hence water flowed to the adjacent house of the plaintiff and caused damage. The defendant was held liable under the rule in ***Rylands Vs. Fletcher***.

iii. Ramnath Vs. Kalanath:

The defendant constructed a dam in his land and damage is done to a neighbour's property (plaintiff). Here the defendant was held liable.

For the rule in Rylands Vs. Fletcher to apply, it is essential that the thing causing the damage must escape outside the area of control of the defendant. If there is no escape, then there can be no liability under the rule.

iv. Read Vs. Lyons and Co.,:

The plaintiff, an employee in the defendant's ammunition factory, while performing her duties inside the defendant's factory, a shell being manufactured there, exploded and she was injured. There was no evidence of negligence on the part of the defendants.

The Court held that even though the exploded shell was a dangerous thing, the defendants were not liable because there was no 'escape' of the thing outside the

defendant's premises. The rule in Rylands Vs. Fletcher does not apply to this case.

B. EXCEPTIONS TO THE RULE IN RYLANDS VS. FLETCHER:

1. Natural use of the land:

Playing cricket in the cricket ground is natural use of the land, and hence if anyone is injured due to the hit of the ball, he cannot recover damages.

2. Things naturally attached to the land:

The Rule is ***Rylands Vs. Fletcher*** is applicable only to things, which a person keeps in his land. But, if damage is caused by anything which is naturally attached to the land, then the owner is not liable.

Nobel Vs. Harrisons:

The plaintiff was injured by the fall of a branch from a good tree in the defendant's land. The Court held that the defendant was not liable as there was no escape outside the land.

3. Act of God or Vis major:

If by supernatural power like lightning, flood, etc., something escapes and causes damage, then the defendant is not liable.

Nicholas Vs. Marsland:

The defendant constructed a dam, and by a violent storm, water flooded out and injured the plaintiff's property.

The Court held that it was an Act of God and so the defendant was not liable.

4. WRONGFUL ACT OF A STRANGER:

If a third party wrongfully or intentionally causes any damage to the plaintiff, then the defendant was not liable.

Richards Vs. Lothian:

A third person deliberately blocked up the waste pipe of lavatory basin in the defendant's premises. The plaintiff's premises was flooded due to this. Held that the defendant was not liable, because it was not the act defendant but a third party.

5. PLAINTIFF'S OWN FAULT:

If the escape is due to the plaintiff's negligence or own fault, then the defendant is not liable.

Ponting Vs. Noaks:

The plaintiff's horse escaped and ate some poisonous tree in the defendant's boundary and died. As the escape of the horse was is due the plaintiff's own fault and not due to the defendant, he was not liable for compensation.

6. COMMON BENEFIT:

If the escape is due to the consent of the plaintiff and it is for common benefit of both the plaintiff and the defendant, then the defendant is not liable.

Carstairs Vs. Taylor:

The plaintiff and defendant stored water in the upper storey. The defendant lived in the upper storey. A rat made a hole in the water box and hence damage was caused to the plaintiff. On the above principle, as water is stored for the benefit of both, the defendant was not liable.

7. STATUTORY AUTHORITY:

If the law has authorised the defendant to keep dangerous things, then the defendant is not liable for the loss due to the escape of things in the absence of negligence.

For e.g.: Municipal water tank, animals in approved circus, zoo etc.,

C. RULE IN M.C. MEHTA Vs. UNION OF INDIA:

The Supreme Court, in the famous case ***M.C. Mehta Vs. Union of India,*** has laid down the following new stringent rule.

According to this new rule, any enterprise or industry engaged in dangerous (hazardous) activity is **strictly and absolutely liable** to compensate persons affected by any harm or accident caused by it. The enterprise cannot escape by showing that there was no negligence.

As per this Supreme Court judgment, there are differences between the Rule in ***Rylands Vs. Fletcher*** and Rule in ***M.C. Mehta Vs. Union of India***.

1. The Rule in ***Rylands Vs. Fletcher*** needs non natural use of land by defendant and escape of something from his land, which causes damage. But rule in Mehta does not require these conditions. The defendant should be engaged in a dangerous activity.

2. As the ***Rule in Rylands Vs. Fletcher*** requires escape of thing which causes harm outside the premises. If harm is caused within the premises, then there is no compensation.

   But as per the ***Rule in M.C. Mehta Vs. Union of India***, there is no difference between persons inside the premises and outside the premises as escape of thing causing harm from the premises is not a necessary condition.

3. Though the rule in ***Rylands Vs. Fletcher*** is only strict liability and it is not absolute liability as there are many exceptions for the application of the rule. But the new Rule in M.C. Mehta is not subject to any exception and it is, therefore, absolute.

4. Ordinary or compensatory damages will be awarded in case of ***Rylands Vs. Fletcher***. Exemplary damages can be awarded in cases of M.C. Mehta's case.

THE BHOPAL GAS LEAK DISASTER ACT, 1985:

The Union Carbide India Ltd, which is a subsidiary of Union Carbide Corporation, a multinational company

registered in U.S.A. has set up a plant in Bhopal for the manufacture of pesticides.

In 1984 December 2nd night, there was a mass disaster caused by the leakage of Methyl Isocyanate and other toxic gases. Atleast 3000 persons died and large number of persons incurred serious injuries.

On behalf of the victims who were mostly of the lower economic strata, a large number of cases were filed in Bhopal and in U.S.A.

An 'out of Court settlement' aimed between the Government of India and the Union Carbide Corporation was a failure, and hence, the Government of India proclaimed an Ordinance and passed the Bhopal Gas Leak Disaster Act 1985.

Under this Act, the Government of India was empowered to make a claim arising out of the Bhopal gas leak disaster on behalf of all the claimants against the UCC in the United States.

The Union of India filed a suit on behalf of all the claimants against the UCC in the district Court of New York, USA.

But it was dismissed on the ground that the suit could be more conveniently tried in India and the plant personnel, victims, evidences, etc., were located in India.

After the dismissal, the Union of India filed a suit in the District Court of Bhopal. An interim relief of Rs. 350 crores was ordered. On a civil revision in the High Court of M.P., the interim relief was reduced to Rs. 250 crores.

The UCC, besides deciding to file an appeal against the decision of interim relief, it tried to settle directly with the gas victims through their lawyers in India and U.S.A.

Against this move of direct settlement, the District and Sessions Judge passed an interim order stopping settlement until further orders.

The Supreme Court applied the principle of 'Absolute liability' as laid down in M.C. Mehta Vs.. Union of India, where an enterprise engaged in hazardous and dangerous activity is liable strictly and absolutely in the event of escape of toxic gas, and such liability is not subject to any of the exceptions as contained in rule or Rylands Vs. Flectcher.

A settlement between the Union of India and UCC came after 4 years where, the S.C in UCC Vs. Union of India passed order (14th and 15th February 1989) directing the payment of a sum of Rs. 750 crores to the victims.

Taking into consideration the earlier proceedings in the United States, and the pathetic suffering and urgency for providing relief to the victims of the disaster, this order regarding the settlement was made.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss the rule Rylands Vs. Fletcher, pointing out its exceptions.*
2. *Explain the doctrine of strict liability pointing out its exceptions.*
3. *Discuss the detail the facts and the rules laid down in Rylands Vs. Fletcher and state the exceptions to the Rule.*
4. *Explain the evolution of the new Rule in M.C. Mehta Vs. Union of India.*
5. *What are the differences between Rule in Rylands Vs. Fletcher and M.C. Mehta Vs. Union?*

35. KEEPERS OF DANGEROUS ANIMALS

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction
B. Classification of animals
C. Defences

A. INTRODUCTION:

Strict Liability for damage done by animals was formulated in the famous case ***May Vs. Burdett.***

According to this case, if a person keeps any animal with knowledge of its propensities (Dangerous Character), he keeps it at his peril, and if it does mischief, he is absolutely liable for its consequences. This is known as **'Scienter Rule'**.

The liability of the keeper of the animal depends upon his knowledge of the dangerous character of the animals.

B. CLASSIFICATION OF ANIMALS:

Animals are classified as follows, depending upon the dangerous character of the animals.

1. Dangerous Animals or Ferae Naturae

2. Domestic Animals or Mansutae Naturae

1. Dangerous Animals or Ferae Naturae:

These include lion, bear wolf, elephant, monkey, etc. A person keeping any of these animals must keep it at his peril. If the animal escapes and injures anyone, the owner is liable to pay compensation to the injured party.

Since the animals are dangerous by nature, the injured party need not prove the dangerous character of the animals. Knowledge of their dangerous propensity is presumed.

May Vs. Burdett:

A monkey kept by the defendant bite the plaintiff. The Court held that the defendant was liable even without the proof of defendant's negligence in respect of the control of the monkey. The Court observed that in the case of dangerous animals, the liability arises even without proof of negligence.

2. Domestic Animals or Mansutae Naturae:

These include animals like cats, dogs, horses, camels, cows, pigs, rabbits, etc. These animals are considered harmless and their keeper will not be held liable for the damage done by them unless the injured party proves that the keeper is unaware of its dangerous character.

The following are the essentials to make the owner of the domestic animals liable for damage:

a. The animals must be domestic animals.

b. Its dangerous character must be proved. This is known as 'Scienter'.

c. The owner must have knowledge of the dangerous character of the animals.

d. The proof of a single instance of the dangerous character of the animal is a sufficient notice to the owner.

i. Cox Vs. Burbridge:

The defendant's horse grazing in a field got into the road and kicked a child playing there. As the plaintiff could not prove the Scienter, the defendant was not liable.

ii. Farden Vs. Harcourt Rivington:

The defendant left his dog inside the Salon Motor Car. The dog used to be generally quiet. The plaintiff was walking near the car. The dog jumped over the plaintiff. The window glass panel was smashed, and a piece injured the plaintiff's eye.

The Court held that the defendant was not liable because the plaintiff had not proved the Scienter. Further, the defendant was not negligent, because he left the dog safe inside the car.

iii. Buckle Vs. Holmes:

The plaintiff entered a teashop with a dog in hand. There was car with kitten locked up in the storeroom and it escaped and bit the dog and the plaintiff. As generally cats are not dangerous, the defendant was not held liable.

C. DEFENCES:

1. If the animals escape due to Act of God, no liability attaches to the owner (Act of God).

2. If the plaintiff is contributorily negligent, the defendant is not liable.

3. If the plaintiff undertakes the risk of keeping the animals, the defendant is not liable (Volenti non fit injuria).

4. If a third party lets the animals loose, then the owner cannot be held liable.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *When is an owner held liable for wrongs committed by an animal of his?*
2. *Explain the "Scienter Rule" with regard to the liability of persons having custody of animals.*
3. *Discuss the liability of owners of animals.*
4. *Discuss the liability in tort of a person for wrong that may be committed through the agency of animals under his control.*
5. *State the circumstances in which the owner of an animal may be liable for the damage caused by the animal.*

36. DUTIES AND LIABILITIES OF OCCUPIERS OF PREMISES

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. Occupier

C. Types of persons

D. Duty towards persons entering the premises

E. Liability towards the persons entering the premises

F. Obligations towards licensees under Indian Easements Act, 1882

G. Duties of railway to the level crossers

H. Duty of innkeepers to the occupants

A. INTRODUCTION:

The occupier of a house or a premise has certain duties and liabilities towards the persons entering inside the house or premises. The term **'premises'** includes land, buildings, vehicles like cars, ships, aeroplanes, lifts, railways carriages, scaffoldings, etc.

B. OCCUPIER:

The occupier need not be a person who has entire control over the premises. Two or more persons may share

their control over the premises and in the case, even if one person fails to take care towards persons visiting the premises lawfully, he is liable to the visitor who is injured, but he can claim contribution from the other occupier.

The liability of occupiers of premises is now governed by the **Occupiers Liability Act 1957**.

1. Before the enactment of Occupiers' Liability Act 1957:

The rules governing the obligations of an occupier were rather complicated and uncertain. The liability of an occupier varied according to the persons entering his premises and they were classified as:

i. Persons entering under the contract - e.g., Bill Collector, Tax Collector, etc.

ii. Persons who enter for his own business or for joint interest of both the occupier and the invitee. For e.g., the customer of a shop.

iii. Licenced persons entering with the occupier's permission, either express or implied. E.g.: Guests at a marriage or dinner.

iv. Trespassers: They are unauthorised persons without the express or implied the permission of the occupier. The duty of an occupier towards these persons varied in the descending order.

2. After the Occupiers Liability Act 1957:

After the enactment of the above Act, it has abolished the distinction between an invitee and licensee and now both are included in the term **'visitors'.**

An occupier now owes to his visitors a **single common law duty of care** without any distinction as invitee or licensee. As under the Act, an occupier owes **no duty to the trespassers.**

C. TYPES OF PERSONS:

The duty of an occupier of land and/or building to keep them in safe condition arises with regard to **two** kinds of persons.

1. Persons outside the premises:

The occupier must take care of the structural conditions of the compound wall, so that it may not fall on the persons using the common road adjoining his house.

For the injuries suffered by the above outsiders, i.e., persons who do not enter inside the premises, the liability of the occupier is under the **tort of nuisance** for keeping dangerous things against public safety.

2. Persons entering his premises:

The duty towards persons entering inside the premises is the same towards visitors which now include both invitees and licencees. For trespassers and children, the duties are different.

D. DUTY TOWARDS PERSONS ENTERING THE PREMISES:

A person in possession of any land or building has to keep them in a safe condition so that they may not cause any injury to another person.

In case, he does not take proper care to keep his premises safe and due to this, if any harm is caused to other, then he is liable to pay compensation.

The occupier has got the following duties towards the following persons:

1. Duty towards lawful visitors
2. Duty of occupant to trespassers
3. Duty of occupant to children

1. DUTY TOWARDS LAWFUL VISITORS:

The following are the rules regarding the occupier's duties towards visitors: Visitors include invitees and licencees. The occupier has to take such degree of care to see that the visitor will be reasonably safe in using the premises for the purpose of his visit.

The degree of 'reasonable care' depends upon the circumstances of each case.

The above common duty of reasonable care may be extended, restricted, modified or excluded by an agreement between the parties.

2. Duty of occupant to trespassers:

Generally the owner of the property or occupier of the property has no duty of care towards such person. He enters at his own risk. The owner need not disclose any latent or patent defects.

Duty of occupant to juvenile (child) trespassers:

Generally there is no difference between a child trespasser and adult trespasser. But a child trespasser can become a licensee, if the occupier fails to take reasonable steps to prevent the entry of children. The owner should not injure the children intentionally or put any dangerous trap for them.

3. Duty of occupant to children:

The visitor must exercise **more care in case of child visitor**, as he cannot expect a child to be as careful as an adult.

E. LIABILITY TOWARDS THE PERSONS ENTERING THE PREMISES:

1. Liability towards lawful visitors
2. Liability towards trespassers
3. Liability towards children

1. Liability towards lawful visitors:

Under the Act, the term 'visitors' include both invitees and licensees, i.e., persons entering with implied permission.

Any person entering in order to communicate with the occupier is also a 'visitor with implied permission'. Further, the term 'visitor' includes a person who enters in exercise of **rights conferred by law**. E.g.: Officers of the Court, Police Constables in execution of a Court order or warrant.

2. Liability towards trespassers:

A trespasser is a person who enters into another's property without legal right or permission. He has no obligation from the owner. However, he must not create any willful trap for the trespasser. He should not have done any act with deliberate intention of doing harm to a trespasser.

3. Liability towards children:

The occupant is liable if he fails to exercise **more care in case of child visitor**, as he cannot expect a child to be as careful as an adult.

But generally a child is accompanied by a guardian and in such cases, he need not exercise any special care for them and it is expected that the guardian accompanying the child takes care of the child during the occupancy in the house.

i. Glasgow Corporation Vs. Taylor:

The plaintiff's child entered inside the Botanical garden and ate the poisonous berries. The child died and the plaintiff sued for damages against the Glasgow Corporation.

The Court held that the Corporation was liable to pay compensation, because it did not take sufficient precaution to warn the children of the danger of eating the berries.

Lord Summer observed 'the child had no right to pluck the berries, but the corporation had no right to tempt the child to its death or expose it to temptation regardless of consequences'.

The age and intelligence of the child is also considered in deciding the liability of the occupier.

ii. Indermaur Vs. Dames:

The plaintiff, a gas fitter, entered the defendant's premises for testing certain gas fittings. While testing so, he fell from an unfenced opening of the upper floor and got injured.

The Court held that the plaintiff was an invitee and hence the defendant was held liable for the injury caused to him.

F. OBLIGATIONS TOWARDS LICENSEES UNDER INDIAN EASEMENTS ACT, 1882:

For licensees, the following provisions under Sec. 57 & 58 of the Indian Easements Act, 1882 are in addition applicable.

1. The grantor of a licence is bound to disclose to the licensee any defect in the property affected by the

license, likely to be dangerous to the person or property of the licensee, of which the grantor, is, and the licensee is not aware. (Sec. 57)

2. The grantor of a licence is bound not to do anything likely to render the property affected by the licence dangerous to the person or property of the licensee. (Sec. 58)

i. Cooke Vs. Midland Great Western Railway of Ireland:

A railway company kept a turntable on their land close to a road. Children used to pass through a gap in the fence and play with the turntable. The defendants did not take effective steps to prevent the children or lock the turntable. The plaintiff aged four years was injured.

The House of Lords held that the children were licensees and hence the defendants were liable.

ii. Fairman Vs. Perpetual Investment Building Society:

The plaintiff went to stay with her sister in a building owned by the defendant. Owing to a depression in one of the stairs, the plaintiff fell and got injured.

The Court held that the plaintiff was only a licensee and so the defendant could be held liable only for a concealed danger. The injury to the plaintiff was due to the danger which was obvious and could have been easily observed by her and hence the defendants were not made liable.

iii. Municipal Corporation of Delhi Vs. Sobhagwanti:

In cases of a brick falling from a bridge, a bag of sugar falling from a crane, falling of advertisement banner, it was held that the visitor could claim compensation.

iv. Marrison Vs. Mayor:

The Municipality had planted tree on the roadside and provided spiked iron rods. The plaintiff dashed against them and injured himself on a block out day. Held the defendant was liable for compensation.

v. Caminer Vs. Northern and London Investment Trust Ltd.,:

A tree which was 130 years old standing on the land near a London highway fell down and injured persons along the road.

As the tree was healthy and the occupier could not have foreseen that a disease had attacked the roots of the tree, it was held that the occupiers were not liable either for negligence or nuisance.

G. DUTIES OF RAILWAY TO THE LEVEL CROSSERS:

The Railway Companies should keep the gates of the railway at level crossings closed, at times when it shall be dangerous to allow the public to cross the line.

By negligence in performing this duty, if a person is injured while crossing the line, the Railway Company is

bound to compensate, even though the visitor could see that the train was coming.

So, the Railway administration must take precautions either by putting a railway gate and keeping it closed at the time of train's arrival or putting some other obstructions to prevent the public from passing over the level crossing.

i. Bengal and North Western Railway Company Ltd., Vs. Matukdhari Singh:

The plaintiff's elephant was killed at a level crossing where there was no gatekeeper and so the gate was not closed, when the train approached. The Court held that the Railway Company was liable to compensation.

ii. Robson Vs. N.E. Railway Co.,:

In this case, the train had passed beyond the platform and there were no lights. The passengers could not climb down, but since the plaintiff feared that the train would move, she climbed down in the dark and fell down and injured herself. The Court held that she was entitled for damages.

H. DUTY OF INNKEEPERS TO THE OCCUPANTS:

Innkeeper is the keeper of a common inn for lodging and entertainment to travelers and passengers in consideration of an amount paid by them.

An innkeeper must provide accommodation. If he improperly refuses to accommodate, then he is liable.

Further, the innkeeper is liable for the safety of the goods brought by the travellers, but he is not liable for theft by the guest's servant or friend.

Brewster Vs. Drennan:

The plaintiff's guest at a hotel found that the door of her room had no lock. On her mentioning this to the hotel Manager (defendant), he assured the plaintiff that she could safely leave her belongings in the bedroom.

In her absence, a fur cap belonging to the plaintiff was stolen. The Court held that the defendant was liable for damages to the plaintiff for the loss of the value of fur cap.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Discuss briefly the liability of occupiers of land to visitors.*
2. *Discuss the liability of owners and occupiers of dangerous premises to trespassers, invitees and persons lawfully passing by.*
3. *Explain the occupier's liability towards invitees, licences, trespassers, and passers by.*
4. *What are the duties and liabilities of the occupier of houses towards the persons entering inside the houses?*

37. JUDICIAL REMEDIES AND EXTRA JUDICIAL REMEDIES (KINDS OF DAMAGES)

(IMPORTANT)

The remedies available to plaintiff for a tort are of **two** types:

1. Judicial Remedies 2. Extra Judicial Remedies

I. JUDICIAL REMEDIES:

They are granted by the Court to the affected party against the wrong doer. It is the usual remedy.

It may be of **three** types:

1. Damages
2. Injunction
3. Specific restitution of property

1. DAMAGES:

Damages mean pecuniary or monetary compensation given to the injured party. It is unliquidated. It is proportionate to the loss or damage incurred by the plaintiff.

Kinds of damages:

They are **four** types:

i. Contemptuous or Ignominious damages.

ii. Vindictive or Exemplary or retributory or punitive damages.

iii. Nominal damages.

iv. Real or Substantial or ordinary damages.

i. Contemptuous or Ignominious Damages:

It is awarded by the Court **to recognize a technical or legal wrong**. It is awarded as a mark of disapproval of the conduct of the plaintiff who is equally blameworthy. It is awarded in cases of defamation.

Though the plaintiff may win his case in tort, if the court finds that his case is entirely without merit as per equity, it may award contemptuous damages. Here, the amount awarded may be very small and it is in the form of penalty.

Contemptuous damages are generally awarded in rare cases. E.g., where a person of generally bad reputation brings an action for defamation, which he is technically entitled to win. If his reputation was already so bad, then defamation does not make his reputation worse. So the Court may award contemptuous damages.

ii. Vindictive or Exemplary or Deterrent damages:

Such damages are awarded by the Court to grievous injuries done willfully.

E.g.: Father suing for seduction of his daughter, lady student suing a male student for kissing her in public against her will, etc.

iii. Nominal Damages:

These are awarded as a token of compensation. The compensation is for a small amount. For e.g.: In defamation, if a person has tendered apology, then nominal damages may be awarded as a token of compensation from the defendant.

iv. Real or Substantial or Ordinary damages:

These are fair and reasonable compensation for the loss suffered by the plaintiff. This type of damages are ordinary and proportionate to the injury or loss of the plaintiff.

2. Injunction:

It is an order of a Court restraining the commission, repetition or continuance of a wrongful act of the defendant. The damage must also be irreparable. E.g.: Injunction may be granted to prevent trespass or nuisance or infringement of patent right, etc.

Injunction is two **types:**

i. Positive injunction ii. Negative injunction

i. In **positive injunction**, the Court compels a person to do some positive lawful act. It is also called mandatory injunction.

ii. In **negative injunction**, the Court prevents a person from doing a certain unlawful thing.

3. SPECIFIC RESTITUTION OF PROPERTY:

When a person is wrongly deprived or dispossessed of his property (immovable or specific movable), the Court may order the wrongdoer to return or restitute such property to the real owner of the property.

II. EXTRA-JUDICIAL REMEDIES:

These are the remedies available outside the Court premises. Here, the plaintiff takes the law into his own hands. In the following cases, extra-judicial remedies are available.

1. A person can use reasonable force to defend his body or his property against the acts of the wrongdoer. This is called **'right of self-defence'**.

2. A lawful owner or occupier of an immovable property can use force to expel the trespassers and can reenter into the land. This is called **'right of expulsion and reentry'**.

3. A person wrongfully dispossessed of movable chattels can recover immediate possession by using reasonable force. This is called **'Recaption'**.

4. In the cases of private and public nuisance, the injured party can apply reasonable force to remove such nuisance. This is called **'abatement of nuisance'**.

5. When one person's animals enter the land of another without the owner's permission, and spoil the land, grass, corn, etc., then the owner of the land can detain these animals till sufficient compensation is paid to him by the owner of the animal. This is called **'distress damage feasant'**.

It must be necessary that the animal be detained, only when it is inside the land of the owner.

III. DIFFERENCE BETWEEN JUDICIAL REMEDIES AND EXTRA JUDICIAL REMEDIES:

Judicial remedies are granted by the Court to the affected party and against the wrong doer. It is the usual remedy.

It is of three types namely -

(i) Damages

(ii) Injunction

(iii) Specific restitution of property.

Extra judicial remedies are the remedies available outside the Court premises. Here, the plaintiff takes the law into his own hands.

It is of five types

(i) Right of self-defence

(ii) Right of expulsion and reentry

(iii) Recaption of property

(iv) Abatement (removal) of nuisance

(v) Distress damage feasant (detention of animal till the compensation is paid for the loss caused by the animal).

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What are the remedies available in tort? Explain extra judicial remedies.*

2. *What are judicial and extra judicial remedies? Explain them.*

3. *Difference between judicial and extra judicial remedies.*

38. REMOTENESS OF DAMAGE

(IMPORTANT)

SYNOPSIS:

A. *Introduction*

B. *Essentials for remoteness of damage*

C. *Views of remoteness of damage*

D. *Instances of remoteness of damage*

A. INTRODUCTION:

'Remoteness of damage' is known by the Latin maxim ***'injure non remota causa sed proxima spectatur'***. It means, 'in law, only immediate and direct consequences are considered and not remote ones'.

Loss or damage is said to be remote if the cause of such damage is not immediate and direct. When the two cannot be consecrated as 'cause and effect', then there is no liability, since the damage is too remote.

CAUSA CAUSANS: (THE CAUSE OF CAUSES)

It is the real cause for the loss or damage. It is the proximate cause of the injury. Causa causans is only considered for the purpose of determining whether the loss is direct or remote.

CAUSA SINE QUANON:

(Cause without which there is no consequence). It is the cause without which the event would not have happened. This is not considered for the purpose of determining whether the loss is direct or remote.

For e.g.: A pushes B and B falls on a stone negligently left by C. Here A's pushing B is the causa causans. The presence of the stone negligently laid by C is the causa sine quanon. Here A is the wrongdoer and not C.

B. ESSENTIALS FOR REMOTENESS OF DAMAGE:

1. There should be a breach of legal duty by the defendant.

2. The loss or damage should be direct, immediate and a natural consequence of the Act.

C. VIEWS OF REMOTENESS OF DAMAGE:

Historically, there are **two** views to determine the remoteness of damage. They are:

1. Test of reasonable foresight/Test of Foreseability.

2. Direct consequence test.

1. TEST OF REASONABLE FORESIGHT (TEST OF FORESEABILITY):

According to this test, if a reasonable man would not have foreseen the consequences, then such consequences are considered as remote.

Overseas Tankship Ltd., Vs. Morts Dock Engineering Co., Ltd., (or) Wagon Mound Case:

As a result of negligence on the part of the servants of Overseas Tankship Co., fuel oil was split on to water. The oil was carried away by winds and waves to the Wharf belonging to Morts Dock Engineering Co., and caught fire, thereby causing heavy damage to them.

In an action by the Morts Dock Engineering Co., for negligence of the defendants, the Privy Council held that the defendants were not liable as the damage was unforseable. It was unforseable that the fuel oil spread on water could catch fire, and hence, the defendants were not liable.

Thus in the Wagon Mound Case, the Court adopted the **'reasonable foresight'** theory.

2. DIRECT CONSEQUENCE TEST:

This is of the view that a person is liable for all the direct consequences of his act - whether a reasonable man would have foreseen them or not. This view is held in the leading case in **Re Polemis.**

Polemis and Furness, Withy and Co. Ltd. or In Re Polemis case:

In this case, a steamship called Thrasyvolous totally caught fire and was destroyed due to the negligence of the defendant's servants. The defendant Company servants,

while loading benzene oil in the ship, negligently placed a plank amidst the tins.

Though a reasonable man cannot have foreseen such damage to ship due to a small act, the Court applied the direct consequence test and held the defendants liable.

D. INSTANCES OF REMOTENESS OF DAMAGE:

In the following instances, the damage is remote:

1. When the damage is **not the necessary result of the defendant's act**, the act is considered to be too remote.

   Glover Vs. London and South Western Railway:

   A railway passenger misplaced his ticket and when demanded by the Ticket Collector, he did not produce it. He was wrongly charged and removed from the carriage with force. He failed to take his pair of race glasses from the carriage and lost it.

   The Court held that the loss of glasses was not the necessary result of the Ticket Collector ordering him to go out, and hence he could not get compensation.

2. Similarly, if a person detains a cow or animal to get compensation from its owner due to the loss caused by it, and if the cow dies while in his custody, it is **not the necessary result of seizure** and hence no compensation to the animal owner.

3. When the damage is due to the **plaintiff's own act**, then the damage or loss is deemed to be remote and hence no compensation is available. This is the rule in cases of contributory negligence. ***(Glover Vs. London and South Western Railway)***.

4. When the damage is due to the **wrongful act of third party** and not by the defendant, then the damage is deemed to be remote.

   The maxim underlying it is called ***'Novus actus interveniens'*** (intervention of human activity between the defendant's act and its consequence).

   But if the defendant, by his conduct, directly causes or compels a third person to do an act which produces damage to the plaintiff, then such damage is not too remote.

5. When a third person **interferes effectively** so that the defendant cannot be made liable, the damage caused is deemed to be remote.

Scott Vs. Shepherd: (Nitroglycerine Case)

The defendant threw a lighted squib into a market house. It fell near a person who threw it away from him. A third person did the same. It fell near the plaintiff, exploded and blinded one of his eyes.

The Court held that the defendant was liable to the plaintiff. It observed that the defendant who first threw the lighted squib in the market place should have foreseen that it was dangerous to do so. Hence he was held liable.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What is the test to be applied for determining the remoteness of damage? Refer to decided cases.*
2. *"Consequences are too remote if a reasonable man would not have foreseen them" - Critically examine this statement relating to remoteness of damage, referring also to decided cases.*

39. DOUBTFUL TORTS
(MISCELLANEOUS TORTS)

The boundaries and the areas of application of the law of torts are steadily expanding and consequently, the subject of law of torts is ever growing.

The Jurists and the Lawyers, in the absence of any statutory law in a particular field, and in their anxiety to claim compensation file cases under the law of tort, especially when such wrongs are not covered under any other law.

Therefore, doubts are expressed as to whether some of these newly - recognized wrongs are really torts in the strict sense of the term - tort. Most of the Court cases arise by breaches of contracts/agreements and not on tortious liability.

The right to damages, which is the most characteristic remedy of tort are not claimed in these cases, but of other remedies like restitution, abatement and other directions.

It is because of these reasons, doubts are raised as to whether these cases really come under law of torts or not. On the basis of doubtfulness of these cases, the following cases have been classified as 'doubtful torts'.

1. Right of franchise:

A right of franchise is the right to vote in any local body election like Corporation, Municipality, Panchayath, and it also includes the parliamentary and the assembly elections. Since 'Election Act' and other related Acts have been enacted, at present there are a few cases in tort.

These rights have now become almost obsolete and thus the existing tortious laws regarding elections and electoral rights have to be deleted from law of torts, since they are now considered as doubtful torts.

2. Monopoly businesses:

For bonafide trade competitions, the principle of 'damnum sine injuria' i.e., loss or damage without violation of law is applicable.

However, in monopoly businesses (with Government approval) the licensee can restrain others from carrying on a similar business in nearby places on the basis of disturbance to his business.

Though these types of cases have been held as tort (civil wrong) by various judgements, still doubts are raised as to whether these wrongs are really torts or not.

3. Avoidance of market fees:

A large number of businesses are conducted in big closed/open areas called markets. The business people have to pay market fee for carrying on their businesses inside the market.

Certain unscrupulous business people, to avoid payment of market fee, carry on their businesses outside the market area.

They solicit the customers by personal canvassing and sell their goods at bargained prices. Though this is a fraudulent practice, it is doubtful whether it is actionable under law of tort or not.

4. Actions by autonomous bodies:

Sometimes, the autonomous bodies like University, Medical Council, Bar Council, Tribunals etc., abuse their quasi-judicial powers.

It is doubtful whether such abuse of quasi-judicial powers can be considered as civil wrongs and action can be taken under the law of torts. There is divided opinion on this point, but majority view that action can be maintained under the law of torts for violation of natural justice in the disposal of cases.

5. Waiver of rights:

Sometimes, a man may, by contract, deliberately give up his basic rights. For e.g.: Waiver of the right of opportunity of being heard in an enquiry. Here, he is estopped from contending that there was denial of opportunity of hearing to him.

It is doubtful whether the person can seek remedy under the law of tort, since such cases come under the law of contracts.

6. Expulsion from club, association etc.,:

A person who has been wrongfully expelled from a club or association can sue under law of tort. Similarly, improper expulsion from caste is also actionable before a Court of law.

However, for expulsion made after a fair hearing and in conformity with natural justice, the member expelled cannot claim any damages.

Here again, it is doubtful whether the expulsion as per the by laws of the club, association etc., is a breach of contract under the Indian Contract Act or infringement of right actionable under the law of tort.

7. Breach of confidential information:

If any information is passed on to another person with express or implied instruction that such information must be kept in confidence, then the other person is under a legal duty to keep the information confidential.

It is doubtful whether the breach of confidential information is actionable under the law of tort.

UNIT-IV

SPECIFIC TORTS

(CLASSIFICATION OF TORTS)

SPECIFIC TORTS MAY BE BROADLY CLASSIFIED AS:

1. Personal wrongs
2. Wrongs to property
3. Wrongs to person, estate and property

1. PERSONAL WRONGS:

Assault, battery, mayhem, false imprisonment, seduction, libel and slander, marital rights, etc.,

2. WRONGS TO PROPERTY:

Trespass to land and goods, conversion right, slander of title and goods, maintenance, conspiracy, violation of patent right, copyright, trade mark, trade name, etc.,

3. PERSON AND PROPERTY:

Nuisance, Negligence and Fraud, etc.,

40. TORTS AGAINST PERSON - TORTS AFFECTING BODY- ASSAULT, BATTERY, MAYHEM ASSAULT AND BATTERY

(TRESPASS TO PERSON)

(MOST IMPORTANT)

SYNOPSIS:

A. Definition of Assault
B. Essentials of Assault
C. Definition of Battery
D. Differences between Assault and Battery
E. Defences to an action of Assault and Battery
F. Mayhem

A. DEFINITION OF ASSAULT:

'An assault is the unlawful laying of hands on another or an attempt to do a corporal hurt to another, coupled with present ability and intention to do the act'.

E.g.: A advances to B in a threatening manner to use force upon him. Here A commits assault. A in a heated argument attempts to strike B but stops it at the neck of the moment - here, it is assault.

Assault is defined in the Sec. 351 of the Indian Penal Code thus:

If any person makes any gesture or any preparation, intending that such gesture or preparation will cause another person present to apprehend that the first person is about to use criminal force, then the first person commits an assault.

Explanation:

1. Mere words do not amount to assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gesture or preparation amount to an assault.

   E.g.: A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

2. In assault, a person is put in a fear of violence. Mere verbal threat is not assault.

3. The person committing the assault must have the present ability.

   For e.g., a child cannot be guilty of assault, because though the child may have the intention to commit assault, it has no present ability to commit assault.

B. ESSENTIALS OF ASSAULT:

There are **three** essentials to constitute assault:

1. There must be some gesture or preparation to constitute the threat of force.

2. Such gesture or preparation must cause reasonable fear of violence.

3. Such wrong doer must have the present ability and intention to cause harm.

The intention need not be actual. If reasonable fear or injury or violence is caused in the mind of the plaintiff, it is sufficient to constitute the tort of assault.

Case Laws:

i. R Vs. S. George:

A points an empty gun towards X. If A knows that the gun is not loaded, but B does not know it, then A commits the tort of assault.

ii. Stephens Vs. Myers:

Stephens, the Plaintiff was the Chairman of a meeting. By a resolution of the meeting, Myers was ordered to go out. Myers got angry and shouted that he would pull the Chairman with clenched fist. But Myers was stopped by the Church Warden standing nearby. It was held that Myers was liable for damages..

iii. Morris Vs. Marsden:

Morries was assaulted by a lunatic called Marsden. It was proved that Marsden knew the nature and quality of his tortuous act and hence he was held liable for damages.

C. DEFINITION OF BATTERY:

It is the direct intentional application of force to the body of another individual without his consent or lawful justification.

Explanation:

1. It includes touching a person in a rude and angry manner.

2. The force of touching may be even very slight.

3. Any blow whether inflicted with hand, weapon or any other mechanism constitutes battery.

4. There is no battery, if there is no act by the defendant. E.g.: Mere passive obstruction is not use of force.

Illustration of Battery:

Spitting on the face of a person, throwing over a chair or carriage in which another person is sitting, throwing water over a person, striking a horse so that it bolts and throws its rider, taking a person by the collar, causing another to be medically examined against his will, firing a gun carelessly and hitting another, are all held to be battery.

CASE LAWS:

1. Kader Vs. K.A. Alagarswamy:

A Police Officer put handcuffs and chained an under trial to a window in an hospital during his medical treatment. It was held that the Police Officer was liable for battery.

ii. Hurst Vs. Picture Theatres:

The Manager of a theatre forcibly necked out a spectator from the theatre under the mistaken belief that the spectator had not paid fee for his seat.

The Court held that the spectator was entitled to recover compensation from the Manager under the tort of Battery.

D. DIFFERENCES BETWEEN ASSAULT AND BATTERY:

ASSAULT	BATTERY
1. Motion is necessary but application of force is not complete.	1. Motion is necessary and application of force is complete.
2. Physical contact is not necessary.	2. Physical contact is necessary.
3. Mere fear of physical violence is enough.	3. Fear of physical violence and application of unlawful force are necessary.
4. It is known as incomplete battery.	4. Battery includes assault also.

Sir Winfield's Example:

When a person pulls away a chair when another is about to sit on it, it is an assault till the moment he reaches the floor. But as soon as he comes into contact with the floor, it is battery.

E. DEFENCES TO AN ACTION OF ASSAULT AND BATTERY:

Assault and Battery may be justified in the following **eight** cases:

1. SELF DEFENCE:

It is technically known as **'Son Assault Demesne'**. The plea of self-defence is available against the offender of one's body, the body of one's wife, children, parents and others. Any assault or battery committed in the course of self defence is not a tort.

But the following two conditions must be fulfilled:

a. Self Defence was the only remedy available to such person.

b. The force used must be proportionate as to prevent the harm to be inflicted.

For e.g.: Hitting a man with a small stick must not be the reason for cutting him with a sword.

2. DEFENCE OF ONE'S PROPERTY:

A person can use reasonable force to defend his movable or immovable properties. This does not amount to assault or battery.

3. TO PREVENT A FORCIBLE ENTRY OR SEIZURE OF CHATTELS:

The lawful owner of a property can prevent others from making a forcibly entry or from making a forcible seizure of goods. If the lawful owner exercises reasonable force, it does not amount to assault or battery.

As per the case in ***Sitaram Vs. Jawant Singh***, an occupier is entitled to expel a trespasser and if necessary, even forcibly remove him from the premises.

4. EXERCISE OF PARENTAL OR QUASI-PARENTAL AUTHORITY:

Parents have the right to use reasonable force to correct their children. Similarly, a teacher can also use reasonable force to correct the pupil. It does not amount to assault or battery. But a husband has no corresponding power over his wife.

5. VOLENTI NON FIT INJURIA:

If a person has given his implied consent to face a risk, then he should not complain the harms caused to him by such risk.

For e.g.: In boxing, horse-riding, etc., the learner gives his implied consent and hence cannot sue the trainer for assault or battery.

6. PRESERVATION OF PUBLIC PEACE:

For preserving public peace, a person can use reasonable force, which does not amount to assault or battery.

For e.g., a person fighting in the street, or disturbing a public workshop can be removed from such place by using reasonable force.

7. LEGAL PROCESS:

In serving warrant of arrest, search warrant, etc., a person can use reasonable force for its execution.

8. INEVITABLE ACCIDENT:

Due to inevitable or unavoidable accident, a person may cause harm to another. This harm does not amount to assault or battery. However, the person causing harm must have taken reasonable care and caution and must not be negligent.

F. MAYHEM:

It is the most serious injury next to death. If a man is deprived of a fighting limb. For e.g., hand, leg, finger or teeth, it is called 'Mayhem' and an action can be maintained against such a tort.

In Assault, Battery and Mayhem, it is actionable without proof of actual damage, as they violate the rights of a person. All the three torts are crimes also.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Distinguish between 'Assault, Battery' and 'Mayhem'.*

2. *Explain the dictum "Assault is inchoate battery".*

3. *a. What are the essentials of the tort of Assault?*

   b. A took up a stick and advancing towards B, said "I will give you a beating". Does it amount to any tort?

4. *Define Assault and Battery and explain the difference between them.*

5. *Explain the justification to an action for assault and battery.*

41. FALSE IMPRISONMENT (TRESPASS TO PERSON)

(IMPORTANT)

SYNOPSIS:

A. Definition of false imprisonment

B. Essentials of false imprisonment

C. Defences

D. Remedies

A. DEFINITION OF FALSE IMPRISONMENT:

False Imprisonment is defined as 'the total restraint of liberty, for however short a time, without lawful justification'.

Explanation:

1. The period of total restraint may be even for a very short time.

2. The restraint may either be by physically applying force or by mere showing of authority. For e.g., unauthorised warrant.

   It is enough if a person prevents his movements. But if there is freedom to move in any one direction, it will not amount to false imprisonment. However, it is an offence under Sec. 339 of I.P.C.

3. Place of imprisonment: There should be boundary in all cases of false imprisonment. The boundary may be large or narrow, visible or invisible, movable, or fixed.

B. ESSENTIALS OF FALSE IMPRISONMENT:

1. Complete deprivation of liberty
2. Unlawful detention

1. COMPLETE DEPRIVATION OF LIBERTY:

To constitute the tort of false imprisonment, there need not be actual imprisonment. If the injured person's liberty to move in all directions is completely deprived, then it is sufficient to constitute the tort of false imprisonment. There need not be actual physical force to deprive the liberty completely.

Bird Vs. Jones:

A portion of a bridge was filled with seats to see a boat race. Bird attempted to go along the part of the footpath and climbed over the fence and got into the enclosure without paying the charges.

Jones pulled him back and placed two policemen by his side to prevent him from climbing. However the policemen gave Bird permission to go back. But Bird refused to go back and remained there for half an hour. It was held that there was no false imprisonment because the liberty to move for Bird was not completely deprived. It was only a partial restraint.

Herd Vs. Weardale:

A worker in a coal mine refused wrongfully to do a certain work allotted to him by the Superior Officers, and wanted to go out to the surface by a lift. The Superior Officer refused to permit him to use the lift till the office hours were over. The worker sued for compensation under the tort of false imprisonment. The Court held that he could not claim compensation because it was his duty to remain under the mine during the working hours.

2. UNLAWFUL DETENTION:

If the detention is lawful, then there is no false imprisonment. So the detention must be by an unlawful order.

i. Maharani of Nabha Vs. Province of Madras:

A Police Officer prevented the Maharani of Nabha from boarding a train by misunderstanding a message sent to him. He prevented the Maharani from going out of the Railway compound.

Held that there was no false imprisonment because the detention period was reasonable and the Maharani was not confined or restrained but only her liberty to go in the conveyance was restricted.

Under the Customs Consolidation Act 1876, the Customs Officers were empowered to detain a person who harboured or kept or concealed any prohibited or uncustomed

goods. A wrongful arrest by a private person or by a public officer constitutes False Imprisonment.

ii. Holgate Muhammad's Case:

There was burglary in a house in which the plaintiff was a lodger. The owner saw the Stolen jewels in the window of a jeweler's shop after a few months. The jeweler gave description of the person from whom he purchased the jewellery and the description fitted the plaintiff, according to the owner.

The plaintiff was arrested under suspicion, and interrogated. As there was no evidence against her she was released after a few hours.

The plaintiff brought an action for false imprisonment but as the Constable had acted in good faith and with lawful justification, he was not liable for the tort of false imprisonment.

iii. Meering Vs Graham White Aviation Company Limited:

The claimant was brought to his employer's office to be interrogated in connection with a theft. The claimant did not know this. There were two security guards stationed outside, who prevented him from leaving the office.

Later on, when the claimant found out that he had been detained on the suspicion of his committing a theft, he brought an action for false imprisonment against the defendant.

In deciding the case in favour of the claimant, **Lord Atkins** said -

'A person could be imprisoned without his knowing it. A person could be imprisoned even while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic. It is not necessary that the man detained must know that he was false imprisoned'.

C. DEFENCES:

1. Lawful Detention:

When there is some justification for detaining the person, then there is no false imprisonment.

2. Implied Consent:

If there is implied consent (volenti non fit injuria) on the part of the plaintiff, then the defendant is not liable for false imprisonment.

3. Lawful arrest of person:

If law permits the arrest of a person, when such person was committed some offence, then it is not false imprisonment.

Garikipati Vs Arza Biksham:

The defendant made a false complaint against the plaintiff to the police and on that basis, the plaintiff was arrested, but since the charges was false he was discharged.

The Court held that the defendant is liable for having made a false complaint without any lawful justification.

4. Judicial Officers' Protection Act, 1850:

This Act grants protection to judicial officers for any act done or ordered to be done by them in discharge of their judicial duties.

A person arrested by the orders of a judicial officer cannot sue the judicial officer for false imprisonment. Even if the judicial officer exceeds his jurisdiction under honest belief that he has jurisdiction to do the act, then he is not liable.

D. REMEDIES:

There are **three** remedies for a person subjected to false imprisonment:

1. Action for damages:

The plaintiff is entitled to recover general damages for the imprisonment and by way of special damages, compensation for any expenses incurred to regain freedom and the humiliation suffered.

2. Self Help:

If a person is unlawfully imprisoned, he need not wait till he is released by legal action. He can use reasonable force to escape.

3. Habeas Corpus:

In case of false imprisonment, a person can get a remedy by way of an application for a writ of Habeas Corpus for ending the imprisonment. The writ may be issued either by the Supreme Court or High Courts.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Point out the ingredients of the tort of false imprisonment. State the defences.*

2. *Explain 'false imprisonment' as a trespass to person and distinguish it from the tort of malicious prosecution. (Refer malicious prosecution for this answer).*

3. *What is false imprisonment? What are the defences for the tort or false imprisonment? Discuss the remedies for it.*

4. Write a note on: False imprisonment

TORTS AFFECTING REPUTATION; LIBEL AND SLANDER (DEFAMATION)

This topic has got **two** sub chapters -

A. TYPES OF DEFAMATION (LIBEL AND SLANDER)

B. DEFENCES TO DEFAMATION

42. TYPES OF DEFAMATION (LIBEL AND SLANDER)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. Types of defamation

I. Libel

II. Slander

C. Difference between Libel and Slander

A. INTRODUCTION:

Defamation is the wrong done by a person to another's reputation by words, signs or visible representations. The tort of defamation has been defined by Winfield thus:

'It is a publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tends to make them shun or avoid that person'.

Defamation is both a **civil wrong and a crime.**

B. TYPES OF DEFAMATION:

The tort of defamation is of **two** types:

I. Libel **II. Slander**

Whether a statement is a libel or slander is important in England, but it is not material in India, because they are both treated alike.

I. LIBEL:

It is the publication of false and defamatory statement in some permanent form. Such statement tends to injure the reputation of the other person without lawful justification. E.g., painting of picture, effigy, caricature, advertisement and taking film.

Libel is addressed to the eye. Broadcasting by radio and television are also considered to be libel as they are publication in permanent form.

Essentials of Libel: (Factors for proving Libel)

The following factors must be proved by the plaintiff to succeed in an action for libel:

1. The statement must be false.
2. It must be a defamatory one.
3. It must be made in some permanent form.

4. It must be made without lawful justification.

5. The special damage or loss need not be proved, i.e., it is actionable per se.

1. The Statement must be false:

The falsity of the charge is presumed in the plaintiff's favour. The burden of proof that the words are false does not lie upon the plaintiff. Defamation of a person is taken to be false, until it is proved to be true. It is, however necessary for the plaintiff, to allege in the plaint that the imputation is false and malicious.

The motive of the defendant is not material in determining the liability for libel. Liability for libel does not arise on the intention of the defamer, but on the fact of defamation. Truth is an absolute defence to an action for defamation.

The defamatory statement must be published maliciously with evil motive or without just cause or excuse. Sometimes, even if by mistake or carelessness, something is published, it may amount to Libel.

Morrison Vs. Ritchie:

By mistake, a newspaper published that a lady, the plaintiff who was married only a month ago had given birth to twins. The proprietor of the newspaper was held liable for libel though there was absence of intention or malice.

2. IT MUST BE A DEFAMATORY ONE:

A statement is deemed to be defamatory if any of the following **three** conditions is satisfied:

a. Expose the plaintiff to hatred, contempt, etc.

b. Tend to injure him in his profession or trade.

c. Cause him to be shunned or avoided by his neighbours.

The test is whether the words would tend to lower the plaintiff in the estimation of right thinking members of the society generally.

In the case of libel, it is not necessary to prove the actual loss of reputation. It is sufficient to establish that the defamatory statements made could damage one's reputation. E.g., to call a person a 'Goonda'.

Innuendo:

It means an **'indirect defamation'**. The statement made is not defamatory in the ordinary sense or in apparent terms, but due to the existence of particular circumstances, the statements become defamatory. Such statement constitutes 'Innuendo'.

Thus, if 'X' says "Mr. Z is a very honest man. he never stole my watch". The statement is defamatory. The underlying (real) meaning is that Z. in fact stole the watch, he being dishonest.

Thus, a man may say of another that the latter is a "Harichandra" or "Gandhiji" meaning exactly the reverse of what these saintly persons were.

i. Capital and Counties Bank Vs. Henty & Sons:

Capital and Counties Bank sued the Henty and sons, as one of the Branch Managers of Henty and sons sent a circular to a large number of their customers that they will not receive payment in cheques drawn on any of the branches of the Capital and Counties Bank.

The Bank argued that this amounted to innuendo (libel), because the circular implied the insolvency of the Bank.

The Court held that the words of the circular taken in their natural sense did not convey innuendo and hence no libel.

ii. Cassidy Vs. Daily Mirror:

The defendant published in his newspaper called "Daily Mirror" the photograph of Mr. Corrigon with one Miss X with the following words - "Corrigon, the race horse owner and Miss X, whose engagement has been announced".

Mrs. Cassidy sued the defendant for the tort of libel as the publication defamed her as if she was not the lawful wife of Mr. Cassidy and was leading an immoral life with him. The Court held that the publication amounted to Innuendo, and hence the defendant must pay compensation to Mrs. Cassidy.

iii. ***Hulton Vs. Jones:***

Hulton published a fiction story in his newspaper in which one Jones was accused of living with a mistress in France. Hulton was totally ignorant of the existence of a person called Jones with similar description.

The Court held that the publication referred to Jones though there was no intention to defame him. The defendants were held liable to pay compensation to Jones.

However, the Defamation Act 1952 was passed, which overruled the above judgment. Thus innocent publishers were now saved from suits of the above kind.

3. IT MUST BE IN SOME PERMANENT FORM, I.E., PUBLISHED:

The statement may be in writing, printing (published) or even conveyed by a cinema film or a gramophone record.

i. Boxsius Vs. Goblet Freres:

An Advocate wrote a defamatory letter and sent it to the plaintiff. The plaintiff sued the solicitor for libel, because it was published to the solicitor's clerk.. The Court held that as publication to solicitor's clerk was in the discharge of his duties, the solicitor was not liable for libel.

ii. Youssoupoff Vs. M.G.M. Pictures Ltd:

A picture was screened in which a Russian Princess was shown to be the victim of the lust of a notorious Monk. This lowered the reputation of the princess in the eyes of

the public, and caused her to be shunned and avoided without her fault. The Court held that it was libel.

Illustrations:

i. A sends B a telegram or post card containing defamatory statements. As the telegram is read by post Office staff and the post card can be read by any one, it amounts to publication.

ii. A writes defamatory letter to B a blind person so that his wife or daughter shall read the letter.

iii. A writes letters to his wife B of defamatory matters concerning his wife's father. B discloses the same to her father. B should not publish her husband's letter without his permission as u/s.112 of Indian Evidence Act. So, no defamation.(***T.J.Ponnen Vs. M.C.Verghese***)

i. A. Mudaliar Vs. A. Mudaliar:

The defendant sent a defamatory letter in Urdu knowing that the plaintiff did not know Urdu. It was held that the defendant was liable for libel, because others who knew Urdu could read it.

ii. Nitha Vs. Nussaravenji:

The defendants published in a Newspaper about a lady that she was unfit to carry on the profession of dancing and physical culture. By such act, she would be ruining the future of many poor Parsi girls. The Court held that it was a clear case of libel.

4. It must be made without lawful justification:

The person having lawful authority and justification to make defamatory remarks cannot be sued for defamation. If there is sufficient justification that the statements made are for public interest, public benefit, etc., then it is not actionable.

5. It is actionable per se:

The proof of special damage or the extent of the lowering of reputation need not be proved by the plaintiff in the case of libel. Mere proof of defamation in the form of libel is sufficient to get compensation.

II. SLANDER:

It is the oral false and defamatory statement in some temporary manner (spoken words, gestures, etc). Such statement should injure the reputation of another person without lawful justification. E.g.: Slander is addressed to the ear.

Essentials:

1. The statement must be false.
2. It must be defamatory one.
3. It must be made without lawful - Refer Libel justification.
4. It must be made in temporary form.

The statement made may be by oral spoken words, or by some other transitory form, whether visible or audible such as gestures or inarticulate but significant sounds. So, slander is only addressed to the ear and in temporary form.

5. The special damage should be proved: Slander is not generally actionable per se. It means - only on proof of special damage. i.e., some pecuniary or money loss with loss of reputation, it is actionable in a Court of law. If special damage is not proved, then the plaintiff cannot succeed in his suit.

But in the following five cases, slander is actionable per se and action can be maintained without proof of special damage:

i. When a person is accused wrongly of any criminal offence punishable with imprisonment like theft, robbery, etc, then slander is actionable per se. But if the accusation of criminal offence is punishable with fine only, then it is not actionable per se.

For e.g.: If a person is accused of riding a cycle without light in the night, parking a car by violating the road regulations etc., are not actionable per se, though it amounts to defamation.

ii. If a person is imputed with virulent diseases like V.D., leprosy, etc., which prevents others from associating with the plaintiff, then slander is actionable per se.

The imputation must be that the plaintiff was suffering from the disease at the time, the words were spoken and not at some time in the past. Imputing a person with diseases like small pox, fever etc., does not amount to a suit actionable per se.

iii. When a person's profession, trade or his office is defamed orally, then it is actionable per se. However, such defamatory words must be in relation to his profession and not to his private life. For e.g., calling a lawyer as a person ignorant of law is a slander actionable per se.

iv. When a person's caste is lowered, then it is slander actionable per se. For e.g., calling a person belonging to a higher caste as a Schedule caste, etc.

v. When any woman or girl is imputed with unchastity or adultery, it is a slander actionable per se.

C. DIFFERENCES BETWEEN LIBEL AND SLANDER:

LIBEL	SLANDER
1. It is a false and defamatory statement made in a written form.	1. It is an oral false and defamatory statement (by spoken words).
2. It is addressed to the eyes generally.	2. It addressed to the ears generally.

3. It is in a permanent form (e.g.) painting a picture, effigy, advertisement and taking film.	3. It is a temporary form (e.g.) spoken words, gestures, etc.
4. It is both a civil and criminal wrong.	4. It is a civil wrong in England, but both criminal and civil wrong in India.
5. Special loss or damage need not be proved. So, it is actionable per se.	5. Special damage or loss should be proved except under some exceptional cases. So, Slander is generally not actionable per se.
6. Libel is made with definite and deliberate intention. It shows malice.	6. It may be made in the heat of the moment under sudden provocation.
7. An action for libel is barred after six years in England and one year in India.	7. An action for slander for slander is barred after two years in England and one year in India.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Define Defamation. Distinguish between libel and slander. When is slander actionable per se?*
2. *Distinguish between 'Libel' and 'Slander'.*

43. DEFENCES TO DEFAMATION

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. Justification by truth

C. Fair and Bonafide comment

D. Privilege

A. INTRODUCTION:

Defences to the tort of defamation.

There are **three** main defences to the tort of Defamation:

1. ***Justification by truth***
2. ***Fair and Bonafide Comment***
3. ***Absolute and Qualified Privilege***

B. JUSTIFICATION BY TRUTH:

If a person publishes a true statement, it is not considered as defamation, but a mere belief that the statement is true is not sufficient. The statement must be made for the public interest and public benefit, for e.g. the bad character of a minister can be published and criticized, because it is for the public good.

C. FAIR AND BONAFIDE COMMENT:

Comment means - an expression of opinion of a certain fact. Fair and honest comments are valid and they are not considered as defamation. Thus a fair and bonafide comment on a matter of public interest is not libel. In such a case, it is only a plea of fair comment.

ESSENTIALS:

1. It must be an expression of opinion and not an assertion of fact.

2. It must be made for the public interest. There should not be any wicked intention. The conduct of all civil and criminal actions in Courts, decisions of Judges and the evidence of witnesses can be commented upon, when the trial is over.

   Also, the affairs of State, public acts of Ministers and Officers of the State and public institutions and public entertainments can be commented upon.

3. The comments should be bonafide and fair, but may be exaggerated. However, it must be based on true facts.

ROLLED UP PLEA:

The statements which are true in substance and fact and expressions of opinion i.e., fair comment made in good faith and without malice on a matter of public interest are 'Rolled up plea'.

In other words, the essentials of Rolled up plea is **true statement and fair comment** made in good faith.

Gregory v. Duke of Brunswick:

The plaintiff was an actor and when he performed on the stage of a theatre, the defendant and his associates hissed (made noises) due to malice at the plaintiff and thereby caused him to perform badly and lose his contract.

The Kings Bench held that hissing after conspiracy was not a fair comment on the plaintiff's performance and hence the defendants are liable.

D. PRIVILEGE:

Privilege means additional freedom. Sometimes, the circumstances and place where the statement is made may give rise to a privilege to the person - called privileged person, who cannot be sued for defamation.

Privileges are divided into **two** types:

I. ABSOLUTE PRIVILEGE:

Here, there is no defamation at all. Even if it is defamation, it is excused on the grounds of public policy.

Following are the cases of absolute privilege:

i. Statement or defamatory remark inside the Parliament or Assembly is not defamation. Here, there is Absolute Privilege.

ii. Any defamatory remark made during judicial proceedings is not defamation. (e.g.) Receivers, Jurors, Advocates & Solicitors asking defamatory questions to witnesses during cross examination.

iii. Any defamatory remark made during military or naval proceedings is not defamation.

iv. State proceedings made by a Superior Government Officer to his subordinates is not defamation, but it must be in the course of official duties.

II. QUALIFIED PRIVILEGE:

Qualified Privilege is not defamation if there is honest intention. That is, there should not be any willful or wicked intention.

Defamation Act, 1952:

The nature of qualified privilege is defined in the **Defamation Act, 1952** of England which has substituted the old enactment called **Law of Libel (Amendment) Act, 1888**.

1. The publication in a newspaper of any report is privileged, only if the publication is proved to be made **without malice**. Action for libel can lie in respect of publication of any report, only if the following conditions are proved -

i. The plaintiff must have requested the defendant to publish in the newspaper in which the original publication was made - a reasonable statement by way of explanation/contradiction.

ii. The defendant (publisher) must have -

a. refused or neglected to do so, or

b. has done so in an inadequate manner or

c. has not done in a reasonable manner having regard to all the circumstances.

2. If the publication is prohibited by law, or of any matter is not of public benefit, then there is no rescue under this Act.

Part I of the Schedule to this Act gives **7 classes of statements** which are **privileged without explanation or contradiction**.

Part II of the Schedule contains a list of statements privileged **subject to explanation or contradiction**. They include the reports of findings of the association of art, science, religion or learning, trade unions, or games or sports, etc.

Further, there is qualified privilege for -

i. A fair and accurate report of the proceedings of any public meeting.

ii. A meeting bona fide and lawfully held for a lawful purpose and for the furtherance of or discussion of any matter of public concern.

iii. The proceedings of general meetings of Companies registered under the Companies Act.

Rules of qualified privilege:

1. Any defamatory remark made during the performance of duty is not defamation. E.g., a Superior Officer scolding his subordinates.

   Winstanley Vs. Bampton:

   A creditor wrote a letter to a superior Officer. He asked him to order the subordinate officer to pay off his debt. The Court held that there was no defamation because of qualified privilege.

2. Statement made to protect the interest of both the parties is not defamation, if made to persons of co rresponding interest - e.g. a partner scolding another partner for a business mistake, letter written on behalf of a client to a third party, etc.

3. Fair and accurate reports of judicial proceedings, parliamentary proceedings, etc., are not defamation because of qualified privilege.

Defamation of a deceased person:

Dead persons have reputation. If anybody makes any defamatory statement about a dead person, then he can be

punished for defamation under the I.P.C. Further, he is also defamation to the surviving legal heirs who can take legal action against the defendants.

Defamation of a corporation:

The Corporation is an artificial person and hence, its reputation is different. A Corporation cannot be held liable for personal torts, but it can be liable for making any statement, if it affects the business or reputation of any Company. Similarly, any statement of imputation of libel, slander etc., against the corporation is actionable.

Defamation by or to husband and wife:

Defamatory statement concerning third person made by one spouse to another is not defamation, as it is not considered as publication.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *State briefly the defences available against an action on defamation.*
2. *Examine "Qualified privilege" and 'Fair Comment' as valid defences against defamation.*
3. *Discuss 'Absolute privilege' and 'Qualified privilege' as defences against defamation.*
4. *Write short note on: (a) Defamation Act 1952 (b) Absolute Privilege (c) Qualified Privilege (d) Rolled up plea*

44. NERVOUS SHOCK
(MENTAL SHOCK)

SYNOPSIS:

A. Introduction

B. Essentials of nervous shock

C. Mental shock

A. INTRODUCTION:

It means a shock to the nerve and brain structures (system) of the body. Nervous shock may be caused by words or acts of a person.

B. ESSENTIALS OF NERVOUS SHOCK:

1. The defendant must have made a false statement willfully.

2. The shock must be natural and direct consequence of the wrongful act of the defendant.

3. There must be some bodily illness or disorder following the shock.

CASE LAWS:

i. Wilkinson Vs. Downton:

The defendant falsely represented to the plaintiff, a married woman, that her husband met with an accident, broke his leg and was lying in a hospital. The plaintiff

believed this, suffered violent shock and became seriously ill. The Court held that the damage was direct and natural, and hence compensation was payable.

ii. King Vs. Philips:

A taxi driver, while reversing his taxi, ran over a child and injured him. The child's mother, seeing this accident from her window, screamed and suffered a nervous shock.

The Court held that the taxi driver was not liable, because he could not reasonably have known that it might cause such a shock to the child's mother.

iii. Hambrook Vs. Stokes Bros.,:

A lady parted with her children in a narrow street and then she saw a lorry rashly coming in the street. She was told by a near by person that a child of description of her child had been injured. She immediately suffered nervous shock which resulted in her death.

The Court held that even though the lady suffering the nervous shock was not herself within the area of physical injury, the defendant was liable for informing a wrong message.

C. MENTAL SHOCK:

It is a shock to the moral and intellectual sense of a person. It is a visible injury coupled with mental pain or sorrow. Mental shock is a species of nervous shock.

i. Ownes Vs. Liverpool Corporation:

A tram car negligently driven by a servant of the defendant, collided with a coffin, a dead body carrier. The dead body was thrown off and the relatives of the deceased suffered severe mental shock.

The Court held that the defendants were liable to pay compensation because of mental shock.

ii. Dulien Vs. White:

The servants of the defendant drove a van into a public house and the plaintiff, a pregnant woman who was behind the bar, saw this and suffered severe nervous shock and gave pre-mature birth to a still born child. The defendants were held liable for the shock suffered by the plaintiff.

iii. Boardman Vs. Sunderson:

The defendant backed his car and ran over the foot of the plaintiff's son, and caused severe injury to him. The plaintiff heard the screams of his son and rushed to save him and thus suffered severe mental and nervous shock. The Court held that he was entitled to get damages for the same.

iv. Bourhill Vs. Young:

The plaintiff was unloading her basket from a tram car. At that time, a motor cyclist drove negligently and collided with the tram car and died immediately.

The plaintiffs did not see the accident but she heard its noise. After the body of the deceased was removed, she went to the spot and saw blood left there. Seeing the blood, she suffered a nervous shock which caused premature delivery of still born child.

The House of Lords held that the motor cyclist had no legal duty to take care towards the plaintiff, because she was beyond the danger zone and did not see the accident. Therefore she was not entitled to any damages.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *(a) Discuss the liability for mental and nervous shock with illustrations.*

   (b) Does an action lie for pre natal injuries?

2. *Explain the nature and scope of the action for causing Nervous Shock.*

45. TORTS AFFECTING FREEDOM-MALICIOUS PROSECUTION, MALICIOUS CIVIL ACTION AND ABUSE OF LEGAL PROCESS

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction
B. Essentials of malicious prosecution
C. Difference between false imprisonment and malicious prosecution

A. INTRODUCTION:

It is the institution of an unsuccessful criminal, bankruptcy or liquidation proceedings against an innocent person. It is done only with a malicious intention and not in furtherance of justice. It is also unreasonable and it damages the reputation of an innocent person.

B. ESSENTIALS OF MALICIOUS PROSECUTION:

1. The plaintiff must have been prosecuted in a criminal case or Bankruptcy or liquidation proceedings, by the defendant.

2. The case for the proceedings must be terminated and the plaintiff must be acquitted or at least discharged.

3. The defendant must have launched the case without reasonable and probable cause. If the defendant has

filed the case under an honest and reasonable belief, then it is not actionable under the tort of malicious prosecution.

Abrath Vs. North Western Railway Company:

One M suffered injuries in a Railway accident. The Railway Authorities paid heavy compensation as his wounds were certified as grievous by a Doctor B.

Later on, the Railway Co., came to know that M and B conspired to secure damages from them. So, the Railway Company sued B and M for conspiracy. The case ended in the acquittal of M due to insufficiency of evidence (benefit of doubt). The doctor and M sued the Railway Company for Malicious Prosecution.

However, the Court held that there was no Malicious Prosecution, as the case was filed on reasonable grounds and with honest belief.

4. The prosecution must be instituted with n licious intention. There must be wrongful and willful intention to punish the plaintiff. The malicious intention may be present even from the commencement of case, or subsequently after the case is filed.

5. The plaintiff must have suffered some damage or loss in person, reputation or pocket as a result of prosecution.

Only if all the above essentials are fulfilled, the tort of malicious prosecution can be instituted.

C. DIFFERENCE BETWEEN FALSE IMPRISONMENT AND MALICIOUS PROSECUTION:

FALSE IMPRISONMENT	MALICIOUS PROSECUTION
1. Personal liberty of the plaintiff is wrongfully restrained.	1. It is the malicious institution of criminal proceedings against he plaintiff.
2. The burden of proof lies on the defendant to show that the imprisonment was lawful.	2. The burden of proof lies on the plaintiff to allege and prove the non existence of reasonable cause for prosecution.
3. Malice on the part of the defendant need not be proved by the plaintiff.	3. Here, the plaintiff has to prove that the defendant was actuated by an indirect and improper motive.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Define malicious prosecution. Explain the essential ingredients of malicious prosecution.*
2. *What must be proved in order to enable the Plaintiff to recover damages in a suit for malicious prosecution?*
3. *State the difference between 'False Imprisonment' and 'Malicious Prosecution'.*
4. *Short note on : Malicious prosecution.*

46. CHAMPERTY AND MAINTENANCE

(SHORT NOTE)

Champerty is an agreement whereby a person promises to assist another in the recovery of his property and to share the proceeds of such action.

Maintenance is an agreement whereby a person promotes a litigation, financial or otherwise in which he has no interest of his own i.e., he gives assistance, financial or otherwise to another, to enable him to defend legal proceedings when one has got no legal interest of his own in the subject matter. In England, both Champerty and Maintenance are illegal and opposed to public policy.

But in India, they are not opposed to public policy. However, there should be no moral turpitude or illegal intention.

DIFFERENCE BETWEEN CHAMPERTY AND MAINTENANCE:

1. Champerty is the species while maintenance is the genus.
2. Champerty is an agreement with an object to share proceeds of litigation while maintenance is an agreement with an object to promote litigation.

Bhagawan Dayal Vs. Debi Dayal:

An Advocate entered into an agreement with his client. If the case was won, the client should give a share to the Advocate. The Court held that the agreement was void, as it was opposed to public policy.

47. TORTS AFFECTING DOMESTIC AND OTHER RIGHTS-MARITAL RIGHTS, PARENTAL RIGHTS, RIGHT TO SERVICE, CONTRACTUAL RIGHTS (TORT TO DOMESTIC RELATIONS) (MARITAL RELATIONS/RIGHTS)

SYNOPSIS:

A. Meaning of domestic relations

B. Meaning of loss of service

C. Loss of service of servant (Action by master)

D. Loss of service of child (Action by parent)

E. Loss of society of wife (Action by husband)

F. Loss of society of husband (Action by wife)

A. MEANING OF DOMESTIC RELATIONS:

The following relationships constitute 'domestic relationships'.

i. Master and Servant
ii. Parent and child
iii. Husband and wife

Though there have been vast changes in the relationship of Master and servant, etc., which are now termed as contractual relationship, the traces of old ideals of authority of the head [husband] of the house over his wife, children

and servant still are available in English and Indian case laws.

B. MEANING OF LOSS OF SERVICE:

A master can sue a person who takes away his servant by force, enticement, by causing injuries, imprisonment, etc., thereby causing loss of service to the master.

Similarly in the case of loss of service of child, a parent can sue and in the case of wife, for loss of society and service, the husband can sue. Thus in all cases, the right of action arises only on **proof of loss of service**. The service may be either **actual** or **constructive.**

In case of a hired servant, minor child or wife, the service is constructive and need not be proved, but in other cases, the service must be proved.

C. LOSS OF SERVICE OF SERVANT: (ACTION BY MASTER)

If any person forcefully takes away or entices, harbours or injures his servant, the master can sue such person for loss of service to him. He must however prove that there was loss of service to him.

Harbouring means employing a servant or enticing him. It is a wrong against the master, but injury or imprisonment of the servant is a wrong against the servant also and he can also recover damages from the wrong doer.

Rookes Vs. Barnard:

Rookes, the appellant, was employed as a skilled draughtsman in London Airport by company called BOAC. He became a member of a Trade Union called 'Association of Engineering and Shipbuilding Draughtsmen, as per 100% union membership agreement with BOAC.

Later on, due to some misunderstanding with union AESD, the appellant resigned from the union. The officer bearers of the union were furious and demanded the BOAC to terminate Rookes' services or else threatened to go on strike on full scale.

Due to this threat of strike by the union AESD, the BOAC company terminated the employment of Mr. Rookes, the appellant.

The House of Lords held that the act of the union was an intimidation to cause loss to BOAC Company and therefore, they should pay damages to the appellant.

The contention of the union that they were protected under Sec. 3 of the Trade Disputes Act by which they were immuned from any civil or criminal action for any of the concerted action.

The House of Lords, however, held that their act would not come under Sec. 3, as it was a clear case of criminal act namely intimidation of the employer and any strike on this ground would have amounted to illegal strikes and punishable.

D. LOSS OF SERVICE OF CHILD: (ACTION BY PARENT)

A parent can sue a person who takes away by force, entices, harbours, injures or imprisons his child. Here also, loss of service by the child to the parent must be proved.

Enticement means seduction of daughter, for which the parent or guardian has right of action. The seduced daughter also has right of action for any act of violence or any other tort committed against her. They may also avail the remedy of Habeas Corpus for recovering custody of the child unlawfully detained by another person.

E. LOSS OF SOCIETY OF WIFE: (ACTION BY HUSBAND)

Loss of society of wife to a husband occurs under the following instances namely:

1. Enticement
2. Physical injury or imprisonment

1. ENTICEMENT (ADULTERY):

The husband has a right against any person who entices his wife, thereby causing him loss of her society or consortium. Proving by evidence of enticement depends on the facts of each case.

If the husband ill treats his wife, then any person who takes her way from him can raise humanitarian grounds of protecting her as a defence, in an action by her husband.

The husband can sue the wrong doer for damages for enticement and adultery and also apply for divorce of his wife.

2. PHYSICAL INJURY:

A husband can claim compensation for loss of service and consortium or other damage resulting from physical injury to his wife.

In a famous case ***Noill Vs. Johnsons,*** the husband claimed medical expenses of his wife and the expenses for going and coming from the place residence to hospital and return.

F. LOSS OF SOCIETY OF HUSBAND: (ACTION BY WIFE)

A wife has right of action for enticement of her husband and consequent loss of his society. But she cannot sue for mere impairment of consortium and a wife has no right of action for harbouring her husband.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the provisions of the torts relating to loss of service of child, loss of service of servant and loss of society of wife.*
2. *What is the meaning of 'loss of service' and domestic relations? Does a wife have a right of action for the loss of society of husband?*

48. RIGHT TO PRIVACY

SYNOPSIS:

A. Introduction
B. Interests of right to privacy
C. Defences against right to privacy
D. Action against violation of right to privacy

A. INTRODUCTION:

The right of privacy gives protection against the unauthorized publicity of a person's name, or private affairs causing him **annoyance, mental pain and distress.**

For eg., the use of abusive language which causes mental suffering so as to result in physical illness is interference with the freedom from emotional disturbance of a person and hence, it is a violation of right to privacy.

B. INTERESTS OF RIGHT TO PRIVACY:

The most important interests of right to privacy are as follows:

i. **Interest in seclusion:** The illustrations of violation of seclusion are wire-tapping, over hearing on the telephone, unauthorized entering in to one's room to affect his privacy.

ii. **Interest in personal dignity and self-respect:** It relates to the use of abusive or insulting language, or indecent proposals to affect one's dignity and self-respect.

iii. **Interest in privacy of name, likeness and life history:** The illustrations are - the unauthorized publication of one's photograph for commercial purposes, improper methods adopted by debt-collecting agencies, etc.,

iv. **Interest in sentimental associations:** It includes the unauthorized publicity of personal experiences with intimate friends or loved ones, of letters, and other symbols of sentimental associations with such persons.

C. DEFENCES AGAINST RIGHT TO PRIVACY:

i. Public Interest:

In cases of unauthorized publications, the general defence is the **public interest** in publishing the news. Here, a Court should consider several factors like the motive of the defendants, the sex, status in life, the previous habits of the plaintiff with reference to publicity.

ii. Criminal Cases/Accidents:

People get into public attention, because of criminal cases against them or because of serious accidents. Here, they cannot complain of the resulting publicity. It is the function of the press to publish such news.

D. ACTION AGAINST VIOLATION OF RIGHT TO PRIVACY:

i. An action for the unauthorized use of the name of a person or his property lies, only if it causes or likely to cause loss of business or trade or reputation.

ii. An invasion of the privacy of a person and his property affords independent causes of action.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain right to privacy. What are the defences against violation of right to privacy?*

2. *Right to privacy is a personal freedom of an individual, the violation of which amounts to tort- Discuss.*

3. *Write Short notes on: Right to Privacy.*

49. INTIMIDATION AND CONSPIRACY (TORTIOUS CONSPIRACY)(ECONOMIC TORT)

SYNOPSIS:

A. Introduction

B. Interference with freedom of contract and business relationship

C. Economic tort

A. INTRODUCTION:

When two or more persons combine together for the purpose of causing damage or loss to the plaintiff and if actual damage results, they commit the tort of conspiracy. It is done with wilful intention and without lawful justification. If there is no damage, there can be no tort of conspiracy.

i. Mogul steam ship Co., Vs. MC Gregor Gow and Co.:

Certain ship owners formed an association to secure monopoly of their business. They gave rebates and earned much profits. The plaintiff suffered loss and sued for compensation on the ground that they had committed the tort of conspiracy.

The Court held that the defendants were not liable, because of bonafide competition and trade interest.

ii. Allen Vs. Flood:

The plaintiffs were workers in a ship company. The Union members demanded that the plaintiffs who were non-union members should be dismissed.

The Court held that there was no conspiracy in the dismissal of the plaintiffs, because it was only a restraint from entering into a contract and hence not an actionable wrong.

iii. Quinn Vs. Leathem:

The plaintiff was a butcher. He employed non-union members as servants. The Union members demanded the dismissal of the non-union members. The butcher refused. The defendants forced one of the customers to stop purchasing mutton from the butcher so that he may suffer loss.

The Court held that the defendants were liable to pay compensation for the tort of conspiracy, because they had acted maliciously.

iv. Crofter Tweed Co. Vs. Veitch Co:

The Crofter Company was an industry in wool making. They imported yarn from the Mainland. Certain union members demanded the dismissal of non-union members, who were engaged in importing business. The union officials put an embargo for the import of the yarn. The producers of tweed sued for compensation under conspiracy.

The Court held that the Union members were not liable, because of the benefit of the union members.

B. INTERFERENCE WITH FREEDOM OF CONTRACT AND BUSINESS RELATIONSHIP:

It is to induce one person intentionally and without lawful justification to break his contract to cause damage to the other contracting party.

Essentials:

1. It must be proved that the defendant had brought about a breach of contract between the plaintiff and another person.

2. The plaintiff must have suffered loss due to the breach of contract.

3. The defendant must have knowledge of the contract between the plaintiff and the other person.

4. The defendant may bring about the breach of contract either by direct personal persuasion or indirect procurement.

Lumley Vs. Gye:

Johanna Wagner, a famous opera singer, was under contract to sing for the plaintiff. The defendant paid a large sum of money to induce her to break his contract with the plaintiff and to sing for the defendant. The Court held that the defendant was liable.

C. ECONOMIC TORT:

In the beginning of the **19th century**, there was great industrial and commercial revolution in England.

From then, the tortious conspiracy was applied more and more for violation of trade and business rights ie., trade disputes between employer and workman and hence it was named 'Economic Tort'.

Economic tort is deliberate interference with another party's economic interests.

It is committed in the following ways:

1. Inducement to breach contract – this can be done directly or indirectly

2. Intimidation:

   The following are the essentials to succeed in a claim of intimidation in economic tort:

   i. A threat to the third party , which is is coercive in nature and more than a mere warning

   ii. The threat to do something must be unlawful, For e.g., a crime, tort or breach of contract.

   iii. The third party must have complied with the threat and have done something in furtherence of the threat.

iv. The third party must have suffered some damage due to such threat.

3. Conspiracy – this included conspiracy to commit an unlawful act or to use unlawful means and conspiracy to injure.

4. Unlawful interference with economic business interests.

Remedies:

The following remedies are available for economic torts:

1. Damages
2. Account of profits –

Case Laws:

i. Yokong Line Ltd., of Korea Vs. Rendsburg Investments corpn of Liberia:

A director, with the prime object of protecting the legitimate interests of the share holders of the company, siphoned the funds of the company. His intention was not to affect the plaintiff, a creditor of the company.

The Court held that the act of the director was not malicious and hence had not committed any economic tort. Further, it was only an act of an individual director and not a conspired act by a combination or group of persons.

ii. ***Sorrel Vs. Smith:***

The House of Lords laid down the following rules:

i. **A combination of two or more persons for the purpose of injuring a man in his trade** is unlawful and if it results in damage to him, then it is actionable for conspiracy under economic tort.

ii. **If the real purpose of the combination is not to injure another person** but to forward or defend the trade of the combiners, then no tort is committed, provided illegal means are not used.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain with reference to leading cases, the tort of conspiracy.*
2. *Trace the evolution of the tort of conspiracy.*
3. *Discuss the ingredients of the tort of conspiracy referring also to case laws.*
4. *Explain the essentials of the specific tort of conspiracy. Refer to leading cases.*
5. *Explain economic tort with citing case laws.*
6. *Write Short Note on - (a) Intimidation as a tort (b) Economic tort (c) Conspiracy*

50. TORTS AGAINST PROPERTY (TRESPASS TO IMMOVABLE PROPERTY)

(MOST IMPORTANT)

SYNOPSIS:

A. Introduction

B. Definition of trespass

C. Types of trespass to land

D. Essentials of trespass

E. Defences available for trespass to the defendant

F. Plaintiff's remedies

A. INTRODUCTION:

Trespass to land or an immovable property is an unauthorised entry into the land of another person. It is also the direct and immediate act of interference with the possession of land. To constitute the wrong of trespass, neither force, nor unlawful intention, actual damage or the breaking of any enclosure is necessary.

B. DEFINITION OF TRESPASS:

'Every invasion of private property, however minute, is a trespass'. For e.g., shooting a rifle over a land of another, driving a nail into another's wall, etc. The trespass is a continuing wrong. The cause of action arises from day to day, till the trespass lasts. This principle is known as 'de die in diem'.

Moreover, trespass is actionable per se, i.e., damage need not be proved to sustain action. It is immaterial whether there has been any actual damage or not. Driving a nail into another's wall or shooting over his field or land are instances of trespass to land.

Jus Tertii:

It denotes the right of a third party. If X, who prima facie is liable to restore property to Y, alleges that Z has a more valid title, X is said to set up the jus tertii. This may not be done by an agent as against his principal.

E.g.: In an action for recovery of possession or of ejectment, the plaintiff who bases his claim on his title to the property can succeed only if he proves that he has a subsisting title and the defendant can plead a jus tertii.

In such cases, the rule is that the plaintiff can recover only by the strength of his own title and not by the weakness of the defendant's.

C. TYPES OF TRESPASS TO LAND:

Trespass to land may be committed in any one of the following ways:

1. TRESPASS BY WRONGFUL ENTRY:

It is the wrongful personal entry by the tort feasor on the plaintiff's land. The slightest crossing of the boundary is sufficient e.g., putting a hand through a window, or sitting on a fence. If a person, who has a limited right of entry

upon land, exceeds that right, he is a trespasser. Similarly, excess of use of highway amounts to trespass.

2. Trespass by placing things on the land:

A person can commit trespass by leaving or constructing a physical object on the land of another. To place any thing on or in a land in the possession of another is trespass, as by driving a nail into his wall or placing rubbish against his wall.

Gregory Vs. Piper:

There was a dispute as to the right of pathway between Gregory and piper. To stop Gregory, Piper ordered his servant to heap rubbish which slided down to Gregory's House. Gregory sued piper for trespass and the Court held that he was liable for compensation.

3. Trespass by remaining on the land (contineous trespass):

A person who enters lawfully on the land of another may, afterwards, commit a trespass by remaining there without the licence or permission of the occupier.

For e.g., if a postman after delivering the letters unlawfully remains inside the premises and refuses to leave, he commits trespass by remaining on the land.

4. Trespass by animal:

Trespass by a person's cow, sheep, etc., is considered as trespass by the owner himself. Such a person will be

responsible for the trespass and consequential damage caused by his animal.

But if the defendant proves that the plaintiff has failed in his duty to fence his land, then the plaintiff cannot get compensation.

Ellis Vs. Leftus Iron Co:

There was an iron fence between the plaintiff's and defendant's lands. The defendant's horse injured the plaintiff's mare by biting and kicking her through the fence. The Court held that it was trespass by animal and the defendants were liable for damage.

5. AERIAL TRESPASS:

If a person willfully flies over another man's land so as to cause damage to his property, then it is aerial trespass.

Under Sec. 17 of the Indian Air Crafts Act, the aerial trespass by flight of any aircraft over any property is authorised and hence does not amount to actionable aerial trespass.

i. Giffort Vs. Dent:

The tenant of the upper floor of a building affixed an ornamental sign board in his premises. It projected over the land occupied by another tenant. The Court held that there was trespass and hence the plaintiff could get compensation, eventhough the plaintiff suffered no loss.

ii. Vaux Vs. Newman: (Six Carpenters Case):

Six carpenters entered the inn of the plaintiff, ordered for wine and drank it. They refused to pay the bill. The innkeeper brought an action for trespass against the six carpenters.

The Court held that refusal to payment of bill does not amount to trespass, because their entry inside the inn was lawful and hence they could not be treated as trespassers ab initio.

D. ESSENTIALS OF TRESPASS:

There are **four** essentials to prove trespass:

1. The plaintiff or injured must be in the actual possession of the land.

2. There must be direct and immediate act of interference with the possession of the land.

3. In trespass, the injury should always be direct. If it is indirect or consequential, then it may amount to nuisance but not trespass.

   Sir Winfield's says, 'If I plant a tree on your land, that is a trespass. But if the roots or branches of a tree on my land project into or over your land, that is a nuisance'.

4. Trespass may be committed against the subsoil of one's land.

For e.g.: If A is in possession of the surface soil and B of the subsoil and C walks upon, then there will be a trespass against A, but not against B.

TRESPASS AB INITIO:

When any authority or licence is given to any one by law and if he abuses it, then he becomes a trespasser ab initio. It is treated as if the authority never existed and his original act becomes tortious by subsequent misconduct.

E. DEFENCES AVAILABLE FOR TRESPASS TO THE DEFENDANT:

1. If the defendant proves that he has the right over the plaintiff's land **by prescription or by custom**, then he cannot be sued for trespass.

2. If the plaintiff has given **consent either expressly or impliedly** to the defendant, then the defendant cannot be sued for trespass.

   For e.g., the purchase of a ticket to attend a cinema, a customer entering a shop are all examples of implied consent of the plaintiff. This is based on the maxim ***'Volenti non fit injuria'***.

3. A person **acting under authority of law** cannot be sued for trespass, for e.g., a person enters inside the land of

another for the execution of a legal process like search warrant. He cannot be sued for trespass.

Similarly a creditor can take away the goods if the debtor has defaulted to repay the debts.

4. **Distress Damage Feasant:** Anything animate or inanimate which causes any damage to the land of another can be seized and retained till compensation is paid by its owner for the loss caused by it. This is known as 'Distress Damage Feasant'.

But the remedy or distress must be taken at the time when the damage is done and not later on. In India, the **Cattle Trespass Act** was passed which contains provisions regarding impounding of cattle trespassing.

Sorrel Vs. Paget:

The plaintiff's cow entered into the defendant's land and destroyed some properties. The defendant detained the cow and it died. The plaintiff sued for compensation under the tort of conversion.

The Court held that the defendant was not liable, because he had a right to detain the cow till compensation was paid to him.

5. Under the act of public necessity like putting out fire, saving persons, etc., a person can enter the land of another person even without his consent.

6. A person can commit trespass to defend his goods, animals, etc. However, the force used in such self-defence must be reasonable and proportionate. Under such circumstances, self-defence is a valid reason for an actior. of trespass.

7. An owner of an immovable property who is wrongfully dispossessed may enter on his land and his entry does not amount to trespass.

8. After previous notice, an occupier of a land may enter upon the land of another for the purpose of removing a nuisance. This known as **abatement of nuisance.**

   It must be peaceful without danger to life and only after notice to the occupier to remove the nuisance.

9. A person who has an easementary right over another man's land does not commit trespass by exercising the right.

F. PLAINTIFF'S REMEDIES:

A person whose land is trespassed upon - has one of the following remedies:

1. He may bring an action against the wrong-doer, or

2. He may forcibly defend his possession or forcibly eject him, or

3. He may obtain an injunction to restrain a continuing or a threatened trespass.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Mention the ingredients of the wrong of trespass to immovable property and the defence available to the defendant to an action for trespass.*

2. *What do you understand by trespass to land? What are the remedies available to the plaintiff against the wrongdoer?*

51. PASSING OFF
(INTERFERENCE WITH BUSINESS)

SYNOPSIS:

A. Introduction

B. Rules of passing off

C. Essentials of passing off

D. Types of passing off

E. Goodwill

F. Damage to the goodwill

G. Methods of committing passing off

H. Proof in an action for passing off

A. INTRODUCTION:

Passing off is a false representation intent to deceive the purchasers by believing that the goods which the defendant is selling are really the plaintiff's goods. The passing off may be by statement, mark, name, design, appearance, etc., of another persons goods.

For e.g.: When a trade mark including the good will of a trader is infringed, the proprietor of the trademark incurs loss in his business and/or the infringer makes profits in his business.

In such circumstances, the proprietor of the 'trade mark/good will' gets the right to sue the infringer in a Civil Court for unliquidated damages for the tort of passing off.

B. RULES OF PASSING OFF:

According to the law of passing off, a person is not entitled to offer his goods as the goods of another person and similarly, he is not entitled to use another man's trade mark, sign, symbol, device, etc., as of his.

By such misrepresentation, the customers are deceived and/or tempted to buy the copied goods and in the process, the infringer makes unlawful profits.

Now, the law of passing off is being extended to even professions and non-trading activities also. Wherever there is unfair competition which causes damage or injury to the goodwill or trademark of another person, the remedy is available to the aggrieved proprietor of the trade mark by way of a civil suit for passing off.

C. ESSENTIALS OF PASSING OFF:

1. There should be a misrepresentation of trade mark or good will or brand or brand name, etc.,

2. Such misrepresentation must have been made in the course of trade.

3. It must have been made to the customers, who must have believed and acted upon it.

4. The misrepresentation is calculated to affect the business or goodwill of another trader.

5. There should be actual damage or likelihood of damage to a business or goodwill of another trader.

The remedies in a passing off action includes an injunction, damages or account of profits and/or delivery/ erasure/destruction of the offending articles.

D. TYPES OF PASSING OFF:

Initially, the tort of passing off contained copyright violations, trademark violations, patent right violations, etc., but after the enactment of the Copy Right Act 1957, the Patents Act 1950, the Trade Mark Act 1999, the cases filed under law of tort for infringement of the above marks are being filed before the competent authorities/tribunals under the above enactments.

E. GOODWILL:

'Good will' is a commercial term and not a legal term. The value of the reputation and connections established by a person in his business due to his integrity, efficiency in service, quality of the products etc., is called the good will of the business.

This good will is an intangible asset of the business and depends upon the nature and character of the business. It differs from trade to trade.

Good will is the advantage other than the value of the capital stock, fund or property employed therein due to encouragement received from its customers. It is gained by the continuous years of honest work and the prestige earned through it.

IMPORTANCE OF GOODWILL:

1. In settling the accounts of a firm after dissolution, the goodwill is included in the assets and it may be sold either separately or along with other properties of the firm.

2. When the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but he may not -

i. Use the firm name

ii. Represent himself as carrying on the business of the firm or

iii. Solicit the custom of persons who were dealing with the firm before its dissolution.

Goodwill is a kind of trademark for a business and hence, the proprietor of the business can sue others for infringement of goodwill.

F. DAMAGE TO THE GOODWILL:

The most essential ingredient for passing off is the damage or likelihood of damage to the goodwill of the plaintiff.

Though there need not be proof of actual damage to the goodwill, the plaintiff must atleast show that there is a reasonable probability of his goodwill being affected by the defendant's infringing action.

G. METHODS OF COMMITTING PASSING OFF:

There are several methods for committing the tort of passing off. Some of the important methods are as follows:

1. False representation either directly or indirectly of the goodwill/trademark of another trader.

2. Copying/imitation of such trade mark fully or partly.

3. Copying/imitation of a traders' name fully or partly.

4. Copying/imitation of the label of a trader's business fully or partly.

5. Copying/imitation of the design or shape of the goods of a trader fully or partly.

6. Copying/imitation of the goods, brand/brand name of a trader, etc.,

7. Copying/imitation of the package of the goods of a trader.

8. Sale of second hand articles as genuine original articles of a trader.

9. Copying/imitating the name of patented articles of a trader.

10. Use of plaintiffs' reference letter and numerals.

The words copying/ imitating / adopting / modeling/ substituting / similar to, etc., are the words often used to constitute the offence of infringement of trademark.

Raddway Vs. Banham:

The Court held that the defendant should be restrained from using the words **"Camel hair belting"** for his goods, as they were used by the plaintiff to refer his goods and such usage of the words would misled the public.

H. PROOF IN AN ACTION FOR PASSING OFF:

1. The plaintiff has acquired a sufficient goodwill and reputation in his trade mark.

2. The defendant has caused deception among the customers by using/imitating the trademark of the plaintiff.

3. The plaintiff has suffered or is likely to suffer damage in his business or goodwill.

Thus the action for passing off is available to a trader for the protection of his proprietary right in his goodwill, trademark and business.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain passing off as a tortious remedy for infringement and registered trademark.*

2. *What is the common law remedy available to the trademark holder for infringement of trademark.*

3. *Explain 'passing off'. How far it is applicable as remedy for infringement of trademark and goodwill?*

4. *Write short note on Passing off*

52. DECEIT OR FRAUD
(LIABILITY FOR MIS-STATEMENTS)

SYNOPSIS:

A. *Definition / Types of fraud*
B. *Essentials of fraud*
C. *Explanation*
D. *Constructive fraud*
E. *Consequences of fraud*
F. *Silence as to facts*
G. *Differences between fraud and misrepresentation*

A. DEFINITION/TYPES OF FRAUD:

In Derry Vs. Peek, Lord Hershell defined fraud as 'a false statement made knowingly or without belief in its truth or recklessly careless whether it be true or false'.

The following acts amounts to fraud -

1. False representation of a fact made **with the knowledge of false hood.**

2. False representation or suggestion of a fact made **without belief in its truth.**

3. False representation of a fact **made recklessly without knowing whether it is true or not.**

4. A promise made **without any intention of performing it.**

5. Any act **fitted to deceive.**

6. Any act or omission which the **law specially declares to be fraudulent.**

Examples:

i. A sells by auction to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not a fraud on the part of A.

ii. In the above example, B is A's daughter and has just come of age. Here the relation between the parties make A's duty to tell B if the horse is unsound.

Types of Fraud:

Fraud may be committed by **two** methods:

i. Suggestio falsi - suggestion of falsehood called false misrepresentation.

ii. Suppressio veri - suppression of truth. When there is a duty to speak, if truth is suppressed and not revealed, then it amounts to fraud.

B. ESSENTIALS OF FRAUD:

1. There must be a false representation or a false assertion.

2 The false representation must relate to a fact and not of law.

3 There should be intention to induce the other party to act upon it and the representation must have been made before the conclusion of the contract.

4 The representation must have been made either -

a. with knowledge of falsity.

b without belief in its truth.

c. recklessly not caring whether it is true or not.

5 The other party must have been induced to act upon such representation.

6 The other party, relying upon the representation must have been deceived.

7 The other party must have suffered some loss subsequently.

C. EXPLANATION:

1 There must be a false representation or assertion:

In order to constitute fraud, there must be a representation or assertion which must contain false or untrue facts. Such facts must be disclosed by way of speaking, writing, etc. Non disclosure or silence does

not generally amount to fraud. But there is an exception to it.

Exception:

When there is a **duty to speak** such facts, the tort feasor should speak or disclose the fact. If he remains silent, then it amounts to fraud.

Peek Vs. Gurney:

The prospectus of a company did not refer to the existence of a document disclosing liabilities. This gave the impression that the company was prosperous. If the existence of the document had been disclosed, the impression would have been quite different.

The Court held that the non disclosure of liability statement amounted to fraud and anyone who purchased shares on the faith of this prospectus could have avoided the contract, besides claiming damages.

2. The false representation must relate to a fact:

Expression of opinion or description cannot be considered as representation.

E.g.: A sells gold ornaments to B and makes the following statements:

i. All gold sold in Chennai City are of good quality. This is a statement of opinion.

ii. The gold ornaments sold by A are of good quality. This is a statement of fact.

iii. The gold ornaments sold by A's shop are the best available in the market for the price. This is a puffing or advertising statement.

In the above three statements, only the second statement amounts to fraud, if the gold ornaments sold by A are not of good quality.

3. The representation must be done before the conclusion of the contract with the intention of inducing the other party to act upon it.

4. The representation must have been made either -

a. with knowledge of its falsity

b. without belief in its truth

c. recklessly not caring whether it is true or not.

Reese River Silver Mining Co., Vs. Smith:

A company issued a prospectus giving information about the sound assets of Nevoda. A shareholder took the share on faith of the prospectus and later on, wanted to avoid the contract. The Court held that he could not do so as the representation did not amount to fraud.

5. The other party must have been induced to act on the representation.

Smith Vs. Chadwick:

'A' bought shares in a Company based on the statement in the prospectus, which contained an untrue statement that 'B', was a Director of the Company. As 'A' was aware that B was not a director, the statement did not induce 'A' to buy the shares and hence his claim for damages was dismissed.

6. The other party relying upon the misrepresentation must have been deceived. If the other party has given the consent independently and not on the basis of deception, then the first party is not liable.

State Bank of India Vs. Shyama Devi:

The plaintiff's husband gave some amount and cheques to his friend, an employee in the defendant bank to be deposited in the plaintiff's account. The employee did not give any proper receipt for the deposits and he misappropriated the amount.

The Supreme Court held that the employee, when he committed the fraud, was not acting in the scope of bank's employment but in his private capacity as depositor's friend, therefore, the defendant bank was not liable for fraud of the employee.

7. The other party must have suffered some loss subsequently. Without damage or loss, there is no fraud. Similarly damage without fraud does not give rise to an action on deceit. Attempt to commit fraud is not a tort.

D. CONSTRUCTIVE FRAUD:

In the following cases, even if it is an innocent misrepresentation, it amounts to fraud. Here, honesty is not a defence and hence misrepresentation amounts to fraud:

1. Contractual duty
2. Fiduciary relationship
3. Warranty of authority
4. Estoppel
5. Issue of prospectus to directors

Derry Vs. Peek:

Peek and another person were Directors of Tramway Company. They applied for a licence to use steam power for the trams. They honestly believed that they would definitely get the licence from the Board of Trade. So, they issued a prospectus stating that they had the right to use the steam power.

Derry took a share in the company on the strength of the right to use steam power. But the Board of trade refused to give licence and so the company was wound up. Derry claimed damages.

The Court held that the act of the directors was not fraud, because of their honest belief that they would definitely get the licence from the Board of trade. This is known as the ***rule in Derry Vs. Peek***.

However, the rule in Derry Vs. Peek is now not applicable in the issue of prospectus, as utmost good faith is necessary.

E. CONSEQUENCES OF FRAUD:

A contract induced by fraud is voidable at the option of the party defrauded. The party defrauded has the following remedies.

1. He can rescind the contract, but he must act within a reasonable time.

2. He can insist on the performance of the contract.

3. He can sue for damages.

F. SILENCE AS TO FACTS:

Mere silence is not fraud. A person need not disclose to the other party the material facts, but he must not give misstatements.

Keates Vs. Lord Cadogan:

Before letting his house, a landlord failed to tell the tenant that it was in a ruinous condition. Held he was not liable for deceit.

EXCEPTIONS:

Under the following circumstances, silence to facts becomes fraud:

1. If the person keeping silent has a duty to speak due to circumstance of the case, he must speak.

   E.g.: F sells his horse which he knows to be unsound, to D his daughter. Here, the relation between the parties makes it a duty of F to tell the fact. If he does not tell so, it will amount to fraud.

2. Where the silence in itself is equivalent to speech.

   E.g.: A says to B, 'if you do not deny it. I shall assume that the horse is unsound'. Here B's silence is equivalent to speech.

G. DIFFERENCES BETWEEN FRAUD AND MISREPRESENTATION:

FRAUD	MISREPRESENTATION
1. The person making an untrue statement knows that it is not true.	1. The person making an untrue statement believes it to be true through it is not true.
2. In fraud, there is clear intention to deceive the other party.	2. No intention to deceive the other party.
3. It is deliberate or willful.	3. It is done innocently.

4. The remedy is not limited to rescission alone. He can also claim damages.	4. The aggrieved party can rescind the contract or sue for restitution, but not both.
5. There can be a suit for damages.	5. There can be no suit for damages.
6. It is a criminal act called cheating.	6. It is not a criminal act.
7. It is of many types and the list may be further added by law.	7. It is of only one type.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Define fraud and discuss its characteristics.*
2. *What is a fraud? In how many ways fraud can be committed?*
3. *Is silence fraud? Is there a necessity to make full disclosure of facts in every kind of contract?*
4. *What do you mean by fraud? Enumerate the characteristics of fraud?*
5. *'A mere silence as to facts is not fraud' – Discuss.*
6. *Fraud is a tort and in contract, it causes voidable contract – Comment.*
7. *'An attempt at deceit, which does not deceive, is no fraud' - Comment.*

53. CONVERSION
(TRESPASS TO MOVABLE PROPERTY/TRESPASS TO GOODS)

SYNOPSIS:

A. Introduction
B. Types of conversion
C. Remedies available to the lawful owner
D. Defences available to the offender
E. Difference between Conversion and Passing off
F. Difference between Conversion and trespass

A. INTRODUCTION:

'Conversion' or 'Trover' is the wrongful taking or using or destroying the goods or an exercise of dominion over the goods, which is inconsistent with the title of the owner.

B. TYPES OF CONVERSION:

The tort of conversion can be committed in any of the following **six** methods:

1. WRONGFUL TAKING AND USING OF THE PROPERTY:

If a person takes a property actually so as to deprive the owner's right to enjoy or possess the property, then it is conversion. The taking need not be with intention of acquiring full ownership.

But there should be an intention to exercise permanent or temporary dominion over property for using it. There must be actual taking of the property.

E.g.: If a person breaks 'the over hanging branches of another man's tree' and eats its fruits, then he is guilty of conversion.

Fouldes Vs. Willoughby:

Fouldes, the plaintiff went inside a boat with two horses. The boatman refused to carry the horses and asked Fouldes to leave the horses at the shore. Fouldes refused to do so. Willoughby took the horses and put them on the shore. Fouldes had to remain on the boat itself and he was taken to the other side of the river by Willoughby.

Because there was no intention to exercise permanent or temporary dominion over the horses, it was not a conversion.

2. WRONGFUL PARTING WITH THE PROPERTY:

If a person wrongfully hands over the goods of another so as to give him some right over the property either as owner or otherwise, then it is conversion.

3. WRONGFUL SELLING OF THE PROPERTY:

Wrongful sale of goods is conversion, because by sale, the property or ownership in goods passes to the purchaser and so the ownership of real owner is deprived.

4. Wrongful detaining of the property:

Conversion may be committed by detention of the property, i.e., wrongful withholding of goods belonging to another.

For e.g.: If a bailee wrongfully refuses to return the goods bailed to the bailor on demand, then it is conversion.

Armory Vs. Delamirie:

Armory, the plaintiff, was a sweeper boy. He found valuable jewels in the street. He took it and gave it to the goldsmith by name Delamirie to ascertain the value of the jewel. The goldsmith gave him just 32 pences. The boy refused to accept the money and demanded the jewel back.

The Court held that the boy was the finder of lost goods and hence he was the owner of the jewel, when the real owner could not be traced.

5. Wrongful destroying of property:

Wrongful destruction of goods so as to deprive the use of a thing fully is conversion. For e.g., spilling away the wine from a jar and filling the jar with water.

6. Denial of lawful owner's right:

Eventhough the offender does not physically deprive the property from owner, if he does any act to deny the owner's right, then it is conversion.

C. REMEDIES AVAILABLE TO THE LAWFUL OWNER:

1. Retaking the goods by applying reasonable force.

2. Court's order to restore the property in goods.

3. Damages.

D. DEFENCES AVAILABLE TO THE OFFENDER:

1. Lien or Pledge:

The defendant can raise the plea that he keeps the goods as a security for the recovery of debts from the plaintiff and so he has not committed any conversion.

2. Right of stoppage in transit:

When the seller gets the information that the buyer has become insolvent, then he can stop the sold goods which are in transit - provided that the price for the goods remains unpaid.

3. Sale in the Market Overt:

If the goods are purchased in a legally constituted market, then the buyer cannot be sued for conversion.

4. Execution of a decree:

If the goods are brought under auction, sale by the order of the execution of a Court, then the buyer cannot be sued for conversion, because he is protected under law.

E. DIFFERENCE BETWEEN CONVERSION AND PASSING OFF:

1. Conversion is the wrongful taking or using or destroying the goods or an exercise of dominion over the goods, which is inconsistent with the title of the owner.

   Passing off is a false representation with the intent to deceive the purchasers by believing that the goods which the defendant is selling are really the plaintiff's goods. The passing off may be by statement, mark, name, design, appearance, etc., of another person's goods.

2. The remedies for conversion are retaking of the goods by applying reasonable force, Court order to restore the goods and claim for compensation. Proof of damage is necessary.

   The remedies for passing off is injunction, destruction of infringed goods, damages and or account of profits made by the defendant. Proof of damage is not necessary.

3. Conversion relates to only movable goods whereas passing off relates to infringement of trademark, copyright, patent right, industrial design, etc.,

F. DIFFERENCE BETWEEN CONVERSION AND TRESPASS:

1. Conversion is the wrongful taking, using, selling or destroying the goods or an exercise of dominion over

the goods, which is inconsistent with the title of the owner. It is trespass to movable property. Whereas trespass to an immovable property is an unauthorised entry into the land of another person.

2. The remedies for trespass are damages, forceful ejection of trespassers and injunction. The remedies for conversion are retaking of property by force, restoration by Court order and damages.

3. Trespass is committed by wrongful entry, placing of things, remaining on the land, by animals and aerial trespass. Conversion is committed by wrongful taking, using, selling, destroying the goods or denying the owner's lawful rights over the goods.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What constitutes trespass to movable property? What defence can you use in such an action?*

2. *Explain the ingredient of the tort of conversion. Mention the remedies.*

54. SLANDER OF TITLE / INJURIOUS FALSEHOOD AND SLANDER OF GOODS

I. SLANDER OF TITLE/INJURIOUS FALSEHOOD:

It is the false and malicious statement about a person, his property or business which damages his title to property, or business or generally material interest. This is known as **injurious falsehood**.

E.g.: If 'A' is about to sell his land and at the auction, B tells falsely that A's land is mortgaged and so no one buys the land. Here, B is liable for slander of title.

ESSENTIALS:

1. Falsehood:

The statement published or given must be false. If it is true, it is not slander of title.

2. Malice:

The statement must be made maliciously in order to injure the plaintiff. If it is made with bonafide intention, it is not slander of title.

3. Actual damages:

Injury or damage should be actually caused to the property (real or personal).

In England, it is not necessary to allege or prove special damage. But, under the Indian law, it is necessary to prove special damage.

DIFFERENCE BETWEEN SLANDER OF TITLE/ INJURIOUS FALSEHOOD AND DEFAMATION:

SLANDER OF TITLE/ INJURIOUS FALSEHOOD	DEFAMATION
1. The words are not defamatory. They only damage a man's title to property.	1. The words tend to lower the person's reputation in the eyes of the society.
2. There is no presumption about the words being untrue. The plaintiff has to prove that the words are untrue.	2. The falsity of charge is presumed in the plaintiff's favour.
3. The right of action for slander of title survives to an executor.	3. The right of action for defamation dies with the defamed person.

Ratcliffe Vs. Evans:

The defendants published in his newspaper a false statement that the plaintiff had ceased to carry on his business, and this caused loss of customers to the plaintiff. Held that the defendant was liable for the tort to 'slander of title' or 'injurious falsehood'.

II. SLANDER OF GOODS:

If a person falsely and maliciously disparages a man's goods and thereby prevents their sale, he is liable for slander of goods. This is also known as **'Trade Libel'**.

ESSENTIALS:

1. Publication of a false statement to some other person than the plaintiff.

2. The said publication must disparage (lowering in value) the plaintiff's property.

3. The publication should cause special damage to the plaintiff.

4. The statement must be published maliciously. But mere puffing of goods, i.e., statement by one trader that his goods are superior to that of another, are not actionable.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Define 'Slander of Goods' and 'Slander of Title'. Distinguish between the two.*
2. *Distinguish between 'Slander of Title' and 'Slander of Goods'.*
3. *Short Notes: (a) Slander of title of goods (b) Injurious falsehood (c) Slander of title.*

55. JOINT TORT FEASORS

(IMPORTANT)

SYNOPSIS:

A. Introduction

B. Independent tort feasors

C. Essentials of joint tort feasors

D. Circumstances in which joint liability arises

E. Nature of tort feasors' liability

F. Rules regarding the liability of tort feasors

A. INTRODUCTION:

A tort, if committed by several persons, such persons may be either 'joint tort feasors' or 'independent tort feasors'. If all the persons are liable for the same tort, then they are deemed to be joint tort feasors.

B. INDEPENDENT TORT FEASORS:

If several persons acting independently and do not concur to produce a single damage, they are called independent tort feasors.

Illustrations:

Two motor cars coming in opposite directions rashly driven by A and B collide and crush a pedestrian in between them. A and B are independent tort feasors, as there is no

concerted action between them, eventhough there is a common design.

C. ESSENTIALS OF JOINT TORT FEASORS:

1. They must commit the tort in furtherance of a common design.

2. There must be concerted action among them.

Illustrations:

Two drivers X and Y, with the object of getting in front of a car driven by Z, drive their cars in a rash and negligent manner that both their cars collide against Z's car and damage it. X and Y are liable to Z as joint tort feasors. But if damage is caused without concerted action between X and Y, then they are independent tort feasors.

D. CIRCUMSTANCES IN WHICH JOINT LIABILITY ARISES:

1. Agency

2. Vicarious liability

3. Joint or common action

1. AGENCY:

If A is an agent of B, to act on his behalf, then the tort committed by the agent holds both the principal A and the agent B liable.

Orneil Vs. Paterson:

Two dogs belonging to two different owners attacked and injured several sheep. The owner of the sheep claimed damages from both the owners of the dogs. The owner of one dog contended that he was liable only for half of the damages.

The Court held that both the owners were jointly and severally liable. So also, the whole amount of damages could be claimed from a single owner.

2. Vicariots Liability:

If a servant commits a tort in the course of employment of his master, the law imposes vicarious liability on the employer or master so that both the master and servant are deemed to be joint tort feasors.

3. Joint or Common Action:

If any joint act is done by several persons, in pursuance of a concerted purpose, all those who jointly commit the tort are liable for it irrespective of the share of each person in the tort.

E. NATURE OF TORT FEASORS' LIABILITY:

1. The joint tort feasors are jointly and severally liable.

2. A release of one of the several tort feasors releases all the others.

3. If a judgment is obtained against one of the tort feasors and if the whole amount of damages is obtained from him, then the other joint tort feasors cannot be sued.

F. RULES REGARDING THE LIABILITY OF TORT FEASORS:

There are two rules regarding the liability of the tort feasors:

1. The Rule in Brunsmead's case.

2. The Rule in Merryweather's case (The Rule of 'no contribution between the joint tort feasors').

1. THE RULE IN BRUNSMEAD'S CASE:

Brunsmead Vs. Harrison:

H and T were responsible jointly for damage of B's piano. As B could not get any amount from T, he sued the other wrongdoer H to obtain the price of the piano. It was held that the prior judgment obtained by B against T was a bar to subsequent action against the other tort feasor H.

The decision was based on the principle that in the interest of the State, there must be a finality for litigations (interest republicae et sit finis litium). A judgment obtained against any one of the joint tort feasors is deemed to have released the others.

To avoid such hardship caused to such plaintiffs as in Brunsmead's case the law was modified by the Law Reforms Act 1935. (Married women and Tort feasors).

Main provisions:

1. The previous action against one or some of the tort feasors is not a bar to subsequent suit against other tort feasors.

2. The amount recoverable should not exceed the amount awarded in the previous action.

3. The plaintiff cannot recover contribution in the subsequent action except when the Court thinks reasonable.

2. Rule of 'no contribution between joint tort feasors':

Rule in 'Merryweather Vs. Nixon':

This rule is based on the maxim ***'Exturpi causa non oritur actio'*** which means that, out of a turpitude or bad act, no action will arise. So, a joint tort feasor who has satisfied the claim of the plaintiff cannot seek any contribution from other tort feasors.

The rule is based on the leading case:

Merryweather Vs. Nixon:

Merryweather and Nixon destroyed a machinery belonging to S. S brought a suit against both and got a

judgment for 840/- S claimed the whole amount from Merryweather alone. He paid the whole amount and then Merryweather claimed contribution from Nixon.

The Court held that Merryweather could not get contribution from Nixon. This is known as the Rule in Merryweather Vs. Nixon. It says that there is neither indemnity nor contribution between joint tort feasors.

***Exceptions to the 'Rule in* Merryweather Vs. Nixon':**

1. According to the Maritime Conventions Act 1911, the rule does not apply to **admiralty cases**.

2. According to the Companies Act, the rule does not apply to the cases of **Joint Liability of the Directors**.

3. It does not apply to **cases of indemnity** (e.g., Vicarious Liability).

4. It does not apply to **abetment**.

5. It does not apply to **cases of negligence or any intentional acts**.

Abolition of 'Rule in Merryweather Vs. Nixon':

The Law Reforms Act of 1935 abolished the 'Rule in Merryweather Vs. Nixon'.

Main provisions of Law Reforms Act, 1935:

1. A joint tort feasor can recover contribution from other joint tort feasors.

2. The amount of contribution must be just and equitable.

3. The Court may exempt any of the joint tort feasors from the liability of contribution.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *State the law relating to liability of joint Tort feasors.*

2. *Who are joint feasors? What is their liability?*

56. DEATH IN RELATION TO TORTS (ACTIO PERSONALIS MORITUR CUM PERSONA)

Generally, if an injury was done to the person or property of another, for which damages could be recovered, the action dies with the death of the person to whom or by whom the wrong was done.

A personal right of action dies with the death of the person and does not survive to the legal heirs. This is known by the legal maxim ***'Actio personalis moritur cum persona'*** which means the right to sue dies with the death of the person.

ENGLISH LAW:

The Law Reform Act 1934 had abolished the maxim ***'actio personalis moritur cum persona'*** except for the exceptions, and now all the rights survive to the legal representatives.

Liability of legal heirs for the personal wrongs of the person:

On the death of the person wronged, the Administrators or Executors cannot maintain action against the legal heirs for personal wrongs like assault, libel, false imprisonment, negligence, trespass to his goods.

Balbir Singh Vs. Sir Ganga Ram Hospital:

A surgeon by his gross negligence caused the death of the complainant's minor son. A case was filed against the surgeon by the complainant's father. Even while the complaint was pending for adjudication, the surgeon who was the respondent in the case died.

The National Commission applied the rule of ***'actio personalis moritur cum persona'*** and held that by the death of the surgeon, the right of action had come to an end and the surgeon's legal heirs could not be held liable.

EXCEPTIONS:

1. **Liability/rights of legal heirs for torts to property by/against the deceased:**

The liability of legal heirs for torts to property committed by the deceased devolve to the legal heirs after his death, but the extent of liability does not exceed the value of the property so acquired. Similarly, the rights of the legal heirs for the tort to property committed against the deceased when he was alive, survives upon the l4egal heirs.

The passing of the **Law Reform (Miscellaneous Provisions) Act, 1934**, Section 1 (1) of the Act provides that 'on the death of any person, all causes of action subsisting against or vested in him shall survive against or as the case may be **for the benefit of his estate**'.

2. Liability/rights of legal heirs for the contracts entered by the deceased:

The rule that a cause of action comes to an end with the death of either of the parties does not apply to an action under the law of contract.

Contractual obligations can be enforced by or against the legal representatives of the parties to the contract, except of contracts of personal service, such as the painting of pictures, acting in dramas and films, etc.

In cases where cause of action survives, the damages recoverable does not include exemplary damages.

In cases of death, damages are calculated without reference to any loss or gain to his estate as a result of his death, except the funeral expenses. However, when the death of a person has resulted in no pecuniary loss, then no action lies.

The Fatal Accident's Act: The Executor or Administrator of the property of a person whose death is caused by the wrongful act, default, etc., of another, can bring an action for the benefit of the wife, husband or child of the deceased.

INDIAN LAW:

i. **Before passing of Indian Succession Act 1865, there were two exceptions to the maxim:** For wrongs causing pecuniary loss to the estate of the deceased person,

action could be maintained if the wrong was committed within one year before his death and action was brought within one year after his death.

ii. **After passing of the Indian Succession Act** under Sec. 306, all rights to prosecute any action in favour of a deceased person survive to his executors or administrators, except for defamation, assault, personal injuries not causing the death of the party.

The wrong should have been committed within one year before his death and action should have been brought within two years after the committing of the wrong.

iii. **Under the Fatal Accidents Act**, if the death of the person is caused by negligence of another person, then an action can be maintained for the benefit of the widow, husband, parent or child, by the legal representatives and the suit should be brought within two years from the death of the deceased.

iv. **Under the Law Reform Act 1934**, on the death of any person, all actions against him shall survive against his estate except for defamation, seduction, adultery, etc.,

The proceedings must be pending against the deceased at the date of his death, or the cause of action must have arisen not earlier than six months before his death and proceedings must be initiated not less

than six months after his personal representative took out representation.

v. **Damages for loss of dependency:** It provides compensation to the dependents of the deceased. Compensation is calculated on the basis of loss of pecuniary benefit to the dependants of the deceased.

vi. **Damages for benefit of estate:** The Law Reform Act 1934 abolished the maxim ***'actio personals moritur cum persona'*** and enabled the representatives of the deceased to recover any loss of earnings, pain and suffering and loss of expectation of life for the benefit of the estate.

CAUSING OF DEATH IS ACTIONABLE BY LEGAL HEIRS IN TORT:

The Common Law rule is that 'in a civil Court, the death of human being could not be complained of as an injury' and hence legal heirs cannot claim any compensation for death.

For e.g.: If A dies and even if his death causes loss to his wife, she cannot sue for the loss occurring to her due to A's death. The reason for the rule is that causing the death of a person is not an actionable wrong under civil law.

Rule in Baker Vs. Bolton:

The rule that the causing of death of a person is not a tort was laid down in Baker Vs. Bolton, and is, therefore, also known as the rule in Baker Vs. Bolton.

The facts of the case are as follows:

The plaintiff and his wife were travelling in a stage coach owned by the defendants. Due to the negligence of the defendants, the coach was upset, and the plaintiff sustained injuries. The wife sustained severe injuries and she subsequently died in a hospital.

The Court held that the plaintiff could recover compensation for his injury and the loss of his wife's society from the date of the accident till her death and not after her death.

The principle evolved from this case is that although an action for smaller injuries lies in civil law, the death of a person cannot be complained of as an injury. Causing death of a person is not an actionable wrong (tort) under civil law. This is known as rule in Baker Vs. Bolton.

EXCEPTIONS TO THE RULE IN BAKER VS. BOLTON:

1. Death due to breach of contract:

Causing the death of a person is not actionable as a tort, but if the death is the result of a breach of a contract, then the fact of death may be taken into account in determining the amount of damages payable on the breach of a contract.

Jackson Vs. Watson:

The Plaintiff purchased a tin of salmon from the defendant. The plaintiff's wife died by eating the salmon, which were injurious.

The Court held that the death of the plaintiff's wife had occurred due to breach of a contract of supply of quality salmon unfit for human consumption by the defendant and hence the plaintiff was entitled to claim compensation for the loss of services of the wife due to her death.

2. Compensation under various Statutes:

The Carriage by Air Act, 1961, the Carriage by Railway Act, 1972, the Carriage of Passengers by Road Act, 1974, the Merchant Shipping Act, 1979, Fatal Accidents Act, 1976, the Motor Vehicles Act, 1988 provide compensation to the legal heirs of deceased in case of the death due to the negligence of the defendant.

Rose Vs. Ford:

A 23 year old woman was severely injured in an accident, caused by the negligence of the defendant and her leg was cut off and subsequently she died.

The Court held that the father of the girl was entitled to claim compensation for the benefit of her estate and on account of pain and suffering, loss of leg and diminution in the expectation of her life.

57. DISCHARGE OF TORTS

(IMPORTANT)

If a tort is committed, the right of action arises in favour of the injured person. It comes to an end by one of the following methods:

1. **Death of one of the parties**
2. **By judgment recovered**
3. **By Limitation**
4. **By waiver of torts**
5. **By Accord and Satisfaction**
6. **By release**
7. **Acquiescence**

The extinction of liability is known as 'discharge of torts'.

1. DEATH OF ONE OF THE PARTIES:

Previously death extinguished all the liabilities of the person. But after the Law Reforms Act 1934, it was decided that death extinguished only the liability for personal torts like defamation, assault, etc. All the other causes of action survive to the legal representatives of the deceased.

2. By judgment recovered:

If an action is brought before the Court seeking redress for the tort committed and the judgment is given, the liability for that particular tort comes to an end. If the plaintiff fails, he cannot go in for another legal proceeding.

3. Limitation:

According to law, for every enforcement of person's right, a certain limitation period is fixed. This is done on the basis that law will not help dormant persons. Moreover, a person will not be able to establish a defence due to death of witness or loss of evidence, after certain time.

Under the Indian Limitation Act 1963, different periods of limitations have been provided for different torts.

Examples:

i. One year for personal wrongs like false imprisonment, malicious prosecution, libel, slander, etc.,

ii. No limitation period for fatal accidents and injury claims under the Motor Vehicles Act, 1988.

iii. Three years for trespass to immovable property or conversion or detention of movable property.

iv. Three years for conversion.

4. Waiver of torth:

For the same wrong, if there are more than one remedy and the plaintiff selects one remedy and leaves the others, then he is said to have waived the other remedies. He cannot pursue the remedies, which he had given up.

Waiver may be either express or implied. Waiving of tort means that only the right to recover damages for the tort is waived and not the whole of tort is waived.

5. Accord and Satisfaction:

If the plaintiff and the defendant agree to settle the liability by valuable consideration, the tort is discharged. The agreement is called 'accord' and the consideration is called 'satisfaction'.

When the satisfaction is performed, the right of action comes to an end. In case of joint tort feasors, an accord and satisfaction in favor of one joint tort feasor operates in favour of all. Accord without satisfaction does not bar the right of action.

6. Release:

If the injured party releases the wrong doer by a document, then the liability is discharged. In accord and satisfaction, there is valuable consideration, but in this method, there is no money consideration.

7. ACQUIESCENCE:

When a person who is entitled to enforce a right neglects to do so for a very long time, it is impliedly inferred that he has waived or abandoned his right. His right of action is taken away by such undue delay.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What are the different ways in which a tort is discharged?*

2. *Short notes on: (a) Accord and Satisfaction (b) Limitation*

UNIT- V

I. THE CONSUMER PROTECTION ACT, 2019

II. THE MOTOR VEHICLES ACT, 1988 AND AMENDMENT ACT, 2019

I. CONSUMER PROTECTION ACT, 2019

1. CONSUMERISM AND CONSUMER PROTECTION MOVEMENT OR EVOLUTION AND DEVELOPMENT OF CONSUMERISM

(MOST IMPORTANT)

SYNOPSIS:

- ***A. Consumerism***
- ***B. Consumer Protection Movement-International level***
- ***C. Consumer Protection Movement - Historical perspective***
- ***D. Consumer Movement in USA***
- ***E. Consumer Movement in Great Britain***
- ***F. International Consumer Movement (through United Nations Organisation and other Agencies)***
  - *1. Economic and Social Council*
  - *2. International Labour Organisation*
  - *3. World Health Organisation*
  - *4. Food and Agriculture Organisation*
- ***G. Consumer Movement in India and causes for slow development of consumer movement in India)***
- ***H. Conclusion***

A. CONSUMERISM:

Consumerism is a social movement to safeguard the rights and powers of the consumers at large, in relation to sellers.

Ralph Nadar, the pioneer in Consumer protection movement in nineteen sixties and nineteen seventies, described Consumerism as society's right to quality of life and it is towards the protection, preservation and enhancement of human life.

As long as the commodities sold by the sellers are not injurious to public health and safety, the commodities can be marketed. Consumerism involves rational purchasing and freedom from economic exploitation by merchants.

B. CONSUMER PROTECTION MOVEMENT-INTERNATIONAL LEVEL:

The increase in volume of international trade and commerce has brought in the need for consumer protection movement all over the globe.

The twentieth century saw the growth of consumer protection movement in several countries appreciably. As majority of consumers are of low income group, they face non availability of basic commodities of life at acceptable quality at reasonable price.

The consumer protection in developing countries has become more of a necessity than of academic interest.

At present several legislative enactments, Consumer Courts, Consumer associations, media publications and advertisements about the consumer rights have accelerated the consumer protection movement at a faster pace.

The Consumer Protection Movement is mainly for quality of human life and protection against hazardous and adulterated goods.

C. CONSUMER PROTECTION MOVEMENT (HISTORICAL PERSPECTIVE):

Consumerism was not felt before the Industrial Revolution in Great Britain, as nations were isolated with inadequate transport facilities and goods were manufactured manually without the use of power or energy.

Many countries were economically dependent on agricultural income, where the need for consumer protection was not felt much. There were a few case laws on consumerism which were decided by ordinary Civil Courts and no significant legal principles evolved from such case laws.

Evidence is still available that even in ancient Rome, consumer protection was available. In the middle ages, consumer's standards were set for merchants in many European countries.

Merchants of shoddy goods were dragged round the town with his dress tied around the neck. Only after the Industrial revolution in England, goods and commodities of

different kinds and varieties were made available to the consumers and this became the starting point of consumerism.

The English Sale of Goods Act 1893 was based on the common law of England which did not contain protection aspects for the consumer. In fact, it was the principle of "Caveat emptor" that "let the buyer beware", and the seller was not made responsible for defect in goods, etc.

However, only the dawn of 20th century saw the actual consumer movement. The years following the Second world war stimulated the consumer movement through voluntary action mostly by women's organizations.

In 1955, the British Labour party introduced a phamphlet "battle for the consumer" in the House of Commons which strongly advocated the quality marketing of goods and also setting up a Consumer Council for redressal of consumer grievances.

Followed by this, a retail trading standards association was set up to resolve disputes between retailers and consumers.

Still the consumer revolution was very gradual in Britain and hence it compelled the Government to appoint "Molony" committee to bring in changes in law for the protection of consuming public and to submit a report for better standards for safety, quality and performance and service.

On the basis of the Molony Committee's report, the British Government appointed Consumer Council in 1963 to voice out the consumer's grievances. It was at this stage, the slogan "caveat emptor" (let the buyer beware) became a new slogan "caveat venditor" (let the seller beware).

The Foods and Drugs Act 1955, The Weights and Measures Act 1963, Trade Description Act 1972, Poisons Act 1972, Fair Trading Act 1973, Prices Act 1974, The Competition Act 1980 are certain significant legislative enactments for the welfare and protection of consumers.

The Consumer Protection Act 1987 was the most valuable and most comprehensive Act containing provisions for protection of consumers, prevention of unfair trade practices, improving high standards of goods and services at affordable rates, prevention of monopolistic trade affairs, removal of unilateral and oppressive agreements, provision of choice in consumer goods and services in safeguard of consumer's health and safety.

Parallel to the British consumer movement, due to the rapid economic development in Japan, a series of administrative and legislative measures were taken up by the Government.

In 1968, a law for protection of consumers was enacted and a Commission was established which reported directly to the Prime Minister of Japan.

The legal enactments made by the Government was extended to Municipalities and local Government. Thus in Japan, the Government took initiative for very strong consumer protection movement and at present a large number of voluntary consumer organizations have sprung up for increasing consumer guidance and stronger action.

In New Zealand, under the ministry of Industry and Commerce, a Consumer Council was established in 1959, and a consumer Institute was further established in 1966.

The aim of these bodies is for provision of quality products and also for testing of goods and services, etc. Literatures and magazines for publishing the test results helped improve the goods and services by the manufacturers.

In Australia and many countries in Europe, similar movement started only after nineteen eighties. But in early fifties there were three institutions in Sweden:

1. National Institute of consumer information

2. Ministry for consumer welfare

3. State Consumer Council

Though the consumer movement started in Great Britain, the major contribution for consumer movement was from USA and so, it is considered to be the most advanced among all the consumer societies.

A separate study about USA is, therefore, necessary.

D. CONSUMER MOVEMENT IN USA:

In 1960's even in USA, consumer was not sovereign, and he was a helpless victim of ingenious manipulations, though there was Sherman Act 1890 which made a contract in restraint of trade as illegal and the Federal Trade Commission Act and Claytons Act 1914 preventing unfair methods of competition and Wheeler Lea Act 1938 broadening the powers of Federal Trade Commission.

In nineteen seventies, the largest car manufacturing company 'Ford' was under serious attack when the nation came under energy crisis.

Ralph Nadar - one man Consumer protection movement of the sixties and seventies have brought out the helplessness of consumers. He coined the term "consumer is the sovereign" and his movement started gathering momentum.

His sharp observations and startling conclusions about the shortcomings of the Chevrolet car became the talk of the town and this paved way for many legislations for the protection of consumers. His movement was termed "Ralph Nadar's impact in USA's consumer movement".

The Magnuson - Moss Warranty Act 1975 established two organizations for consumer protection:

1. The Bureau of Consumer Protection to curtail deceptive advertisements.

2. The Bureau of competition for promoting healthy and quality competition.

At present, with the innumerable consumer protection legislations like uniform Consumer Sales Practices Act, Uniform Residential Landlord and Tenant Act, the Consumer Product Safety Act, the Consumer Patient Radiation and Safety Act, the Fair Packaging and Labeling Act, Uniform Land Transaction Act, U.S.A. stands as the Monarch of consumerism.

While the stiff competition has given rise to multi variety of products and services, the Legislative and Voluntary Consumer Organizations act as protectors of consumer rights for supply of quality products for leading a quality life.

E. CONSUMER MOVEMENT IN GREAT BRITAIN:

Refer Synopsis 'C' - Historical Perspective (Page No. 346)

F. INTERNATIONAL CONSUMER MOVEMENT (THROUGH UNITED NATIONS ORGANISATION AND OTHER AGENCIES):

The U.N.O. was established on October 24, 1945. One of the main aims of UNO is that each State must become a welfare state rather than a police state.

Confronted with the galloping increase in volume of international trade and commerce, the role of U.N.O and

other international Agencies in regulating the international trade and commerce with special reference to the protection of consumers was increasingly felt.

The United Nations guidelines for consumer protection notes that international co-operation for consumer protection is needed because the consumer protection policy is not confined only to national level.

To develop world economy which is inter dependent on international commerce, it is necessary to develop international standards for consumer protection. This will avoid conflicts between consumer protection measures of one country with the other.

Further international co-operation is required for exchange of information on banned products to enable the importing countries to protect themselves against these products.

The U.N.O. has the following four important wings in its Constitution namely, **Economic and Social Council, International Labour Organisation, the World Health Organisation, Food and Agriculture Organisation**, whose role have largely contributed to the development of consumerism.

1. Economic and Social Council:

One of the six principal organs of the UNO which shall promote higher standard of living, conditions of economic and social progress, solutions of international economic, social, health and related problems.

In late nineties, the Council recognized the need for consumer protection and it also conducted a survey of various institutions relating to consumerism in different countries.

It required each State to formulate guidelines and implement them for the welfare of consumers.

In 1982, it also adopted a resolution for protection against products banned for consumption. In 1983, it submitted a draft guidelines for consumer protection which was adopted in the General Assembly of the UNO in 1985 for the consumer protection.

The major guidelines are to encourage consumerism all over the globe, to afford greater choice at lower prices, to curb unfair trade practices, to develop international consumerism, to protect consumers from health and safety hazards and to formulate effective and inexpensive legal remedies, etc.

In 1986, the General Assembly another resolution for consumer protection mainly to take steps for protecting consumers from health and safety hazards, furnish adequate information of the goods, curb misleading advertisements and deceptive representations, to propagate consumer education and to implement effective consumer redressal.

On the basis of the above guidelines, various States adopted and implemented the guidelines. In India also, the Consumer Protection Act 1986 was passed.

2. International Labour Organisation:

Its aim is to protect the interests of the workers and their families in the capacity of consumers and to provide with the basic goods at reasonable price, in sufficient quantity in satisfactory quality.

It also developed programmes for welfare activities at the work place and to strengthen the consumer cooperatives and to provide education to workers.

The guidelines enunciated by International Labour Organisation was adopted by several nations in the form of Labour legislations.

3. World Health Organisation:

In 1977, the expert committee of WHO made out a list of drugs to meet the basic health needs of the people and it directed the member countries to provide the medicines at a reasonable price to the consumers. Thus its main object is that the people should possess good health.

4. Food and Agriculture Organisation:

It envisaged special programmes for food control, and to increase the production of the quality and quantity of food stuffs.

It also aimed at proper distribution of the food stuffs to the population, especially to the rural population. It also prepared a code of conduct for distribution and use of pesticides.

The other Agencies like UN Conferences on Trade and Development, World Industrial Property Organisation, United National International Children's Emergency Fund, etc., also played a pivotal roles in the field of consumerism.

G. CONSUMER MOVEMENT IN INDIA AND CAUSES FOR SLOW DEVELOPMENT OF CONSUMER MOVEMENT IN INDIA)

In ancient India, the consumers used to exchange goods between them through barter system. With the development of society with numerous commodities flooded in the market, the barter system was replaced by sale and purchase practice.

Due to reasons like illiteracy, poverty, lack of information, simple needs of people, consumer knowledge was very much lacking. Even today, to buy a commodity, the buyer relies on his personal previous experience or information from his friends or independent agencies.

The information gap about the product is of serious concern to the consumer about the choice of goods. For new technical products, the consumer has to solely rely on the seller or manufacturer.

Further, the laws are not stringent to contain the price hike, nor the redressal machinery renders speedy justice. The people below poverty line are the worst sufferers of fraud, excessive prices, poor quality of merchandise, etc.

It is, therefore, necessary to alleviate the existing maladies, consumer education to create critical awareness, activate consumer involvement and solidarity of consumers is a must. Any product in demand will give scope for exploitation, huge profits to the seller, etc.

The growth of law on the protection of consumers has been on piece meal, haphazard and scattered over a number of unrelated statutes. Reduction sale, free gifts, etc., are inducements for selling goods of poor quality materials.

India, being a developing country, vices like unemployment, poverty, illiteracy, over population, etc., are inevitable. There were several legislations which, however, did not fulfil the expectations of consumers in their protection.

Some of the Acts are the Indian Contract Act 1872, the Sale of Goods Act 1930, the Essential Commodities Act 1955, Drugs Control Act 1950, Prevention of Food Adulteration Act 1954, Standards of Weights and Measures Act 1976 and the Monopolies and Restrictive Trade Practices Act 1969.

In all these Acts, though remedies were available, it was expensive and time consuming and hence rarely invoked by the consumers. Even though the Indian Constitution has provided Articles 38, 47, etc., which aim at promotion of the welfare of the people, raising the level of nutrition, standard of living and improving public health, these were only Directive Principles of State Policy and acted only as guidelines for rulers.

To alleviate all these practical apathies, the Indian Parliament finally enacted the 'Consumer Protection Act 1986' which came into force from first 1st July 1987. The Act is comprehensive, and an additional Legislature which gives simple, speedy and inexpensive remedy for consumer grievances.

Consumer Courts were established at each District level, State level and at National level, and a consumer corpus fund was also created to provide financial assistance to Non-Governmental Consumer Organizations. The 15th March of every year is celebrated as Consumers day. Not only goods, but also services was brought within the ambit of Consumer Protection Act.

The Consumer Protection Amendment 1993 was enacted with certain modifications and additions. The Consumer Welfare Fund was also instituted in 1994 to promote voluntary organizations to spread consumer education.

Due to advanced business transactions in the form of E-commerce, Telemarketing, Online Trading etc., which are consequences of Globalization and Liberalization, a new Consumer Act namely the Consumer Protection Act, 2019 was enacted by the Parliament. The Act has many new provisions in addition to enhancing the monetary jurisdiction limits of Consumer Redressal Forums.

In short, the past decade has seen the consumer movement growing at least to the middle and high class societies and days are not far off for the Act to spread even to rural masses and the poor.

H. CONCLUSION:

The dawn of the 20th century has witnessed nuclear explosions, Space voyage, but also goods and services of very wide range. With the dawn of 21st Century, the room for consumer exploitation was widening due to unscrupulous traders and manufacturers who were least bothered about the consumer welfare.

To end all their mischiefs and misdeeds, a draconian Act in the form of new Consumer Protection Act has found its way in almost all nations of the globe. It is but a significant legal development for a quality living of the people at large.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain Consumerism and trace the development of Consumer protection movement in India.*
2. *Describe the evolution of Consumerism in international level, particularly in USA and Great Britain.*
3. *Define Consumer protection. Compare the development of Consumerism in India with USA and Britain.*
4. *Explain the role of ILO in the development of Consumer movement.*
5. *Consumerism in India is of late origin and not fully developed as in USA and Britain - Comment.*
6. *Critically analyse the causes for slow development of consumer movement in India.*

2. SALIENT FEATURES OF THE CONSUMER PROTECTION ACT, 2019

SYNOPSIS:

A. *Introduction*

B. *Salient features of the Consumer Protection Act, 2019*

1. *Wider Definition of 'Consumer'*
2. *Rights of consumers*
3. *Enhancement of Pecuniary Jurisdiction*
   - i) *District Consumer Forum*
   - ii) *State Consumer Commission*
   - iii) *National Commission*
4. *E-Filing of Complaints*
5. *Establishment of Central Consumer Protection Authority*
6. *Product Liability & Penal Consequences*
7. *Unfair Trade Practices*
8. *Penalties for Misleading Advertisement*
9. *Provision for Alternate Dispute Resolution*

C. *Conclusion*

A. INTRODUCTION :

Due to the development of digital technology, the Consumer Protection Act,1986 has been repealed and a new Act namely the Consumer Protection Act 2019 has been substituted in its place.

Many important changes have been made in the new Act to facilitate the consumers with easy online filing of consumer complaints and settling the disputes early through new methods introduced in the Act.

In short, the aim of the new enactment is to provide the timely and effective administration and quick settlement of consumer disputes.The New Act replaces more than three decades old the Consumer Protection Act, 1986.

B. SALIENT FEATURES OF THE CONSUMER PROTECTION ACT, 2019

1. Wider Definition of 'Consumer' :

The New Act has widened the definition of 'consumer'. The definition now includes any person who buys any goods, whether through offline or online transactions, electronic means, teleshopping, direct selling or multi-level marketing.

The earlier Act did not specifically include e-commerce transactions, and this lacuna has been addressed by the New Act.

2. Rights of Consumers:

The Act provides 6 rights to the consumers;

1) Right to be protected against marketing of goods, products or services which are hazardous to life and property.

2) To have information about the quantity, quality, purity, potency, price, and standard of goods or services.

3) To be protected from unfair or restrictive trade practices.

4) To have a variety of goods or services at competitive prices.

5) Right to be heard and be assured that consumer's interests will receive due consideration at the appropriate fora.

6) Right to consumer awareness.

3. Enhancement of Pecuniary Jurisdiction:

Revised pecuniary limits have been fixed under the New Act.

i) District Consumer Forum:

The District forum now entertains consumer complaints, If the value of goods or services paid does not exceed Rs. 1,00,00,000/- (Rupees One Crore).

ii) State Consumer Commission:

The State Commission entertains disputes where such value exceeds Rs 1,00,00,000/- (Indian Rupees One crore) but does not exceed INR 10,00,00,000 /-(Rupees Ten crores).

iii) National Commission :

National Commission exercises jurisdiction where such value exceeds INR 10,00,00,000 (Rupees Ten crores).

4. E-Filing of Complaints :

The new Act provides flexibility to the consumer to file complaints with the jurisdictional consumer forum located at the place of residence or work of the consumer.

This is unlike the current practice of filing it at the place of purchase or where the seller has its registered office address.

The New Act also contains enabling provisions for consumers to file complaints electronically and for hearing and/or examining parties through video-conferencing. This is aimed to provide procedural ease and reduce inconvenience and harassment to the consumers.

5. Establishment of Central Consumer Protection Authority:

The New Act establishes of a Regulatory Authority known as the 'Central Consumer Protection Authority' (CCPA), with wide powers of enforcement.

The CCPA has an investigation wing, headed by a Director-General, which conducts inquiry or investigation into the consumer law violations.

The CCPA has been granted wide powers to take suo-moto actions, recall products, order reimbursement of the price of goods/services, cancel licenses and file class action suits, if a consumer complaint affects more than one individual.

6. Product Liability & Penal Consequences:

The New Act has introduced the concept of "Product Liability". As per Product Liability, the product manufacturer, product service provider and product seller, are liable for any claim for compensation.

'Product seller' includes a person who is involved in placing the product for a commercial purpose and includes e-commerce selling also. There are increased liability risks for manufacturers as compared to product service providers and product sellers.

The Manufacturer is liable in product liability action, even if he proves that he was not negligent or fraudulent in making the express warranty of a product. The product seller is not liable if the product has been misused, altered or modified.

6. Unfair Trade Practices:

There is a specific broad definition for "Unfair Trade Practices". It also includes sharing of personal information given by the consumer in confidence.

7. Penalties for Misleading Advertisement:

The Central Consumer Protection Authority (CCPA) may impose a penalty of up to Rs 10, 00,000 /- (Rupees Ten Lakhs) on a manufacturer or an endorser, for a false or misleading advertisement.

The CCPA may also sentence them to imprisonment up to 2 years for the same. In case of a subsequent offence, the fine may extend to Rs 50,00,000 (Rupees Fifty lakhs) and imprisonment of up to 5 years.

The CCPA can also prohibit the endorser of a misleading advertisement from endorsing that particular product or service for a period of up to 1 year. For every subsequent offence, the period of prohibition may extend to 3 years.

8. Provision for Alternate Dispute Resolution:

The New Act provides for mediation as an Alternate Dispute Resolution mechanism. It makes the process of dispute adjudication simpler and quicker. This helps the speedier settlement of disputes and reduces the pressure on consumer courts.

C. CONCLUSION :

With the enactment of new Consumer Act, consumer is now to be treated like a King. The manufacturers, endorsers and sellers including E-Sellers have to be cautious and careful in all their business transactions.

UNIVERSITY QUESTIONS FOR REVIEW:

1) *Explain the salient features of the Consumer Protection Act,2019.*
2) *The new Consumer Protection Act,2019 has made the consumer a King -Discuss.*
3) *Write short note on - The Consumer Protection Act, 2019.*

3. IMPORTANT CHANGES IN THE CONSUMER PROTECTION ACT, 2019

The main features of The Consumer Protection Act, 2019 are as follows:-

1. District forum is renamed as District Commission

2. The Opposite Party needs to deposit 50% of the amount ordered by District Commission before filing appeal before State Commission, earlier the ceiling was of maximum of Rs. 25,000/-, which has been removed.

3. The limitation period for filing of appeal to State Commission is increased from 30 days to 45 days, while retaining power to condone the delay.

4. State Commission shall have a minimum of 1 President and 4 Members.

5. The original pecuniary jurisdiction of District Commission shall be uptil Rs. 1 Crore, State Commission from 1 Cr – 10 Cr. And NCDRC to be more than Rs. 10 crore.

6. Now complainant can also institute the complaint within the territorial jurisdiction of the Commission where the complainant resides or personally works for gain besides what was provided earlier

7. Section 49(2) and 59(2) of the new Act gives power to the State Commission and NCDRC respectively to declare any terms of contract, which is unfair to any consumer, to be null and void.

8. A second appeal to NCDRC has been provided U/s 51(3) if there is a substantial question of law involved in the matter.

9. Power of revision can still be exercised by NCDRC U/s 58(1)(b) and by State commission under 47(1)(b) of the Act.

10. Power of review has been conferred to District Commission, State Commission and NCDRC U/s 40, 50 and 60 of the Act respectively.

11. NCDRC can hear appeals against the order of Central Authority by virtue of Section 58 of the Act.

12. Period of limitation in filing of complaint remains 2 years with a provision for condonation of delay power U/s 69 of the Act.

13. Section 70 provides for administrative control of State Commission over District Commission and that of NCDRC over State Commission.

It inter alia provides for investigation into any allegations against the President and members of a State Commission / District Commission and submitting

inquiry report to the State Government concerned along with copy endorsed to the Central Government for necessary action

14. Section 71 confers power of execution as provided Under Order XXI, The Code of Civil Procedure, 1908 with such limitation as provided in the section.

15. Mediation is given statutory status by way of introduction of Section 74 in the new Act.

16. A product liability action may be brought by a complainant against a product manufacturer or a product service provider or a product seller, as the case may be, for any harm caused to him on account of a defective product.

17. Chapter III of the Act provides for creation of Central Authority to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class

18. The Central Authority shall have an Investigation Wing headed by a Director General for the purpose of conducting inquiry or investigation under this Act as may be directed by the Central Authority.

19. The Act of 2019 has come into effect w.e.f. 9.8.19 and old Act of 1986 stands repealed, subject to section 1(3) of the New Act.

20. Rules regarding appointment, conditions of service etc. of the Members are to be notified soon.

UNIVERSITY QUESTIONS FOR REVEIW:

1. *What are the important changes brought about by the Consumer Protection Act, 2019?*

2. *Many important changes have been introduced in the Consumer Protection Act, 2019-Discuss.*

3. *Write Short Note On: Important changes in the Consumer Protection Act, 2019.*

4. OBJECTIVES AND IMPORTANT DEFINITIONS

SYNOPSIS:

A. Preliminary

B. Objective

C. Short title, extent, Commencement and Application (Sec. 1)

D. Definitions (Sec. 2)

A. PRELIMINARY:

This Act came into force on 09-08-2019. The Act contains VII chapters and 107 Sections.

B. OBJECTIVE:

This Act provides for protection of the interests of consumers and for the said purpose, it establishes authorities for timely and effective administration and settlement of consumers' disputes and connected or incidental matters.

C. SHORT TITLE, EXTENT, COMMENCEMENT AND APPLICATION (Sec. 1)

1. This Act is called the Consumer Protection Act, 2019.

2. It extends to the whole of India except the State of Jammu and Kashmir., but after repeal of Article 370 of the Indian Constitution, this Act , as any other

enactment, is applicable to the Union Territory of Jammu and Kashmir, and Ladakh.

3) It comes into force on such date as the Central Government may, by notification, appoint and different dates may be appointed for different States and for different provisions of this Act.

4) This Act applies to all goods and services.

D. DEFINITIONS (Sec. 2)

1) **"Advertisement"** means any audio or visual publicity, representation, endorsement or pronouncement made by means of light, sound, smoke, gas, print, electronic media, internet or website. It includes any notice, circular, label, wrapper, invoice or such other documents. [Sec2(1)]

2) **"Appropriate laboratory"** means a laboratory or an organisation—

(i) Recognised by the Central Government; (or)

(ii) Recognised by a State Government, subject to guidelines issued by the Central Government in this behalf; (or)

(iii) Established by any law, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test

of any goods with a view to determining whether such goods suffer from any defect. [Section 2(2))]

3) **"Branch office"** means—

(i) Any office or place of work described as a branch by the establishment; (or)

(ii) Any establishment carrying on either the same or substantially the same activity carried on by the head office of the establishment;[Section 2(3)]

4) **"Central Authority"** means the Central Consumer Protection Authority established under section 10;[Section 2(4)]

5) **Complainant"** means—

(i) A consumer; (or)

(ii) Any voluntary consumer association registered under any law; (or)

(iii) The Central Government or any State Government; (or)

(iv) The Central Authority; (or)

(v) One or more consumers, where there are numerous consumers having the same interest; (or)

(vi) In case of death of a consumer, his legal heir or legal representative;(or)

(vii) In case of a consumer being a minor, his parent or legal guardian;[Section 2(5)]

6) **"Complaint"** means any allegation in writing, made by a complainant for obtaining any relief under this Act, that—

(i) an unfair contract or unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;

(ii) the goods bought by him or agreed to be bought by him suffer from one or more defects;

(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from any deficiency;

(iv) a trader or a service provider has charged for the goods or for the services mentioned in the complaint, a price in excess of the price—

(a) fixed by any law ; (or)

(b) displayed on the goods or any package containing such goods; (or)

(c) displayed on the price list exhibited by him under any law for the time being in force; (or)

(d) agreed between the parties;

(v) the goods, which are hazardous to life and safety when used, are being offered for sale to the public—

(a) in contravention of standards relating to safety of such goods as required to be complied with under any law;

(b) if the trader knows that the goods so offered are unsafe to the public;

(vi) the services which are hazardous to life and safety of the public when used, are being offered by a person who provides any service and who knows it to be injurious to life and safety;

(vii) a claim for product liability action lies against the product manufacturer, product seller or product service provider;[Section2(6)]

7) **"Consumer"** means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but

does not include a person who obtains such goods for resale or for any commercial purpose; (or)

(ii) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose.

Explanation.—

(a) The expression "commercial purpose" does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;

(b) The expressions "buys any goods" and "hires or avails any services" includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing;[Section2(7)]

8) "**Consumer dispute"** means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint;[Section2(8)]

does not include a person who obtains such goods for resale or for any commercial purpose; (or)

(ii) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose.

Explanation.—

(a) The expression "commercial purpose" does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;

(b) The expressions "buys any goods" and "hires or avails any services" includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing;[Section2(7)]

8) "**Consumer dispute"** means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint;[Section2(8)]

9) **"Consumer rights"** includes,—

(i) the right to be protected against the marketing of goods, products or services which are hazardous to life and property;

(ii) the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices;

(iii) the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices;

(iv) the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate fora;

(v) the right to seek redressal against unfair trade practice or restrictive trade practices or unscrupulous exploitation of consumers; and

(vi) the right to consumer awareness;[Section2(9)]

10) "**Defect"** means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained under any law or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression "defective" is construed accordingly;[Section2(10)]

11) **"Deficiency"** means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained under any law or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes—

(i) any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and

(ii) deliberate withholding of relevant information by such person to the consumer;[Section2(11)]

12) **"Design"**, in relation to a product, means the intended or known physical and material characteristics of such product and includes any intended or known formulation or content of such product and the usual result of the intended manufacturing or other process used to produce such product;[Section2(12)]

13) **"Direct selling"** means marketing, distribution and sale of goods or provision of services through a network of sellers, other than through a permanent retail location;[Section2(13)]

14) **"Director-General"** means the Director-General appointed under section 15(2);[Section2(14)]

15) **"District Commission"** means a District Consumer Disputes Redressal Commission established under section 28(1);[Section2(15)]

16) **"E-commerce"** means buying or selling of goods or services including digital products over digital or electronic network;[Section2(16)]

17) **"Electronic service provider"** means a person who provides technologies or processes to enable a product seller to engage in advertising or selling goods or services to a consumer and includes any online market place or online auction sites;[Section2(17)]

18) **"Endorsement"**, in relation to an advertisement, means—

(i) any message, verbal statement, demonstration; or

(ii) depiction of the name, signature, likeness or other identifiable personal characteristics of an individual; or

(iii) depiction of the name or seal of any institution or organisation, which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement;[Section2(18)]

19) **"Establishment"** includes an advertising agency, commission agent, manufacturing, trading or any other commercial agency which carries on any business, trade or profession or any work in connection with or incidental or ancillary to any commercial activity, trade or profession, or such other class or classes of persons including public utility entities in the manner as may be prescribed;[Section2(19)]

20) **"Express warranty"** means any material statement, affirmation of fact, promise or description relating to a product or service warranting that it conforms to such material statement, affirmation, promise or description and includes any sample or model of a product warranting that the whole of such product conforms to such sample or model;[Section2(20)]

21) **"Goods"** means every kind of movable property and includes "food" as defined in section 3(1)(j)of the Food Safety and Standards Act, 2006;[Section2(21)]

22) **"Harm",** in relation to a product liability, includes—

(i) damage to any property, other than the product itself;

(ii) personal injury, illness or death;

(iii) mental agony or emotional distress attendant to personal injury or illness or damage to property; or

(iv) any loss of consortium or services or other loss resulting from a harm, but does not include any harm caused to a product itself or any damage to the property on account of breach of warranty conditions or any commercial or economic loss, including any direct, incidental or consequential loss relating thereto;[Section2(22)]

23) **"Injury"** means any harm whatever illegally caused to any person, in body, mind or property;[Section2(23)]

24) **"Manufacturer"** means a person who—

(i) makes any goods or parts thereof; (or)

(ii) assembles any goods or parts thereof made by others; (or)

(iii) puts or causes to be put his own mark on any goods made by any other person;[Section2(24)]

25) **"Mediation"** means the process by which a mediator mediates the consumer disputes;[Section2(25)]

26) **"Mediator"** means a mediator referred to in section 75; [Section2(26)]

27) **"Member"** includes the President and a member of the National Commission or a State Commission or a District Commission.[Section2(27)]

28) **"Misleading advertisement"** in relation to any product or service, means - an advertisement, which—

(i) falsely describes such product or service; (or)

(ii) gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; (or)

(iii) conveys an express or implied representation which, if made by the manufacturer or seller or service

provider thereof, would constitute an unfair trade practice; (or)

(iv) deliberately conceals important information; [Section 2(28)]

29) **"National Commission"** means the National Consumer Disputes Redressal Commission established under section 53(1); [Section2(29)]

30) **"Notification"** means a notification published in the Official Gazette. [Section2(30)]

31) **"Person"** includes—

(i) an individual;

(ii) a firm whether registered or not;

(iii) a Hindu undivided family;

(iv) a co-operative society;

(v) an association of persons whether registered under the Societies Registration Act, 1860 or not;

(vi) any corporation, company or a body of individuals whether incorporated or not;

(vii) any artificial juridical person, not falling within any of the preceding sub-clauses; [Section2(31)]

32) **"Prescribed"** means prescribed by rules made by the Central Government, or, the State Government; [Section2(32)]

3) **"Product"** means any article or goods or substance or raw material or any extended cycle of such product.It may be in gaseous, liquid, or solid state. It possesses intrinsic value. It is capable of delivery either as wholly assembled or as a component part.

It is produced for introduction to trade or commerce, and it does not include human tissues, blood, blood products and organs;[Section2(33)]

34) **"Product liability"** means the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in its services ;[Section2(34)]

35) **"Product liability action"** means a complaint filed by a person before a District Commission or State Commission or National Commission for claiming compensation for the harm caused to him;[Section2(35)]

36) **"Product manufacturer"** means a person who—

(i) makes any product or its parts ; (or)

(ii) assembles it's parts made by others; (or)

(iii) puts his own mark on any products made by any other person; (or)

(iv) makes a product and sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains such product or involved in placing such product for commercial purpose; (or)

(v) designs, produces, fabricates, constructs or re-manufactures any product before its sale; (or)

(vi) being a product seller of a product, Person engaged in any of the above functions is also a manufacturer of such product;[Section2(36)]

37) **"Product seller"** means a person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or involved in placing such product for commercial purpose and includes—

(I) a manufacturer who is also a product seller; (or)

(II) a service provider, but does not include—

(a) a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats;

(b) a provider of professional services in any transaction in which, the sale or use of a product is only

incidental thereto, but furnishing of opinion, skill or services being the essence of such transaction;

(c) a person who—

(i) acts only in a financial capacity with respect to the sale of the product;

(ii) is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider;

(iii) leases a product, without having a reasonable opportunity to inspect and discover defects in the product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;[Section2(37)]

38) **"Product service provider",** imeans a person who provides any service in respect of such product; [Section2(38)]

39) **"Regulations"** means the regulations made by the National Commission, or the Central Authority;[Section2(39)]

40) **"Regulator"** means a body or any authority established under any other law;[Section2(40)]

41) **"Restrictive trade practice"** means a trade practice which brings about manipulation of price or its conditions

of delivery or to affect flow of supplies in the market relating to goôds or services so as to impose on the consumers unjustified costs or restrictions and iinclude—

(i) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led to rise in the price;

(ii) any trade practice which requires a consumer to buy, hire or avail of any goods or services as condition precedent for buying, hiring or availing of other goods or services;[Section2(41)]

42) **"Service"** means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;[Section2(42)]

43) **"Spurious goods"** means goods which are falsely claimed to be genuine;[Section2(43)]

44) **"State Commission"** means a State Consumer Disputes Redressal Commission established under section 42(1);[Section2(44)]

45) **"Trader"** means a person who sells or distributes any goods for sale and includes its manufacturer, and if such goods are sold or distributed in package form, includes its packer;[Section2(45)]

UNIVERSITY QUESTIONS FOR REVIEW

1) *Explain the objective and important definitions in the Consumer Protection Act,2019.*

2) *Define- a) Consumer b) Defect in goods c) Deficiency in service d) Restrictive trade practice e) Product Manufacturer f) Product seller g) Product Liability h) Person I) Consumer's rights.*

5. COMPLAINANT [Sec. 2(5)]

Complainant means—

i. A consumer; (or)

ii. Any voluntary consumer association registered under any law; (or)

iii. The Central Government or any State Government; (or)

iv. The Central Authority; (or)

v. One or more consumers, where there are numerous consumers having the same interest; (or)

vi. In case of death of a consumer, his legal heir or legal representative; (or)

vii. In case of a consumer being a minor, his parent or legal guardian; [Section 2(5)]

Generally, the complainant should be the consumer himself. But in certain cases, a person can file a complaint on behalf of the consumer. (E.g.) a husband can file a complaint on behalf of an illiterate wife. ***(Punjab National Bank Vs. K.B. Shetty)***

A stranger to the contract cannot be a complainant, but a voluntary organisation or State or Central Government may make a complaint on behalf of consumers.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Who is a 'complainant' as per the Consumer Protection Act 1986?*

2. *Who can prefer a complaint under the Consumer Protection Act?*

3. *Short Note on: 'Complainant'.*

6. COMPLAINT [Sec. 2(6)]

"Complaint" means any allegation in writing, made by a complainant for obtaining any relief under this Act, that

i. an unfair contract or unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;

ii. the goods bought by him or agreed to be bought by him suffer from one or more defects;

iii. the services hired or availed of or agreed to be hired or availed of by him suffer from any deficiency;

iv. a trader or a service provider has charged for the goods or for the services mentioned in the complaint, a price in excess of the price—

a) fixed by any law ; (or)

b) displayed on the goods or any package containing such goods; (or)

c) displayed on the price list exhibited by him under any law for the time being in force; (or)

d) agreed between the parties;

v. the goods, which are hazardous to life and safety when used, are being offered for sale to the public –

(a) in contravention of standards relating to safety of such goods as required to be complied with under any law;

(b) if the trader knows that the goods so offered are unsafe to the public;

vi. the services which are hazardous to life and safety of the public when used, are being offered by a person who provides any service and who knows it to be injurious to life and safety;

vii. a claim for product liability action lies against the product manufacturer, product seller or product service provider; [Section2(6)]

Explanation:

1. The complaint made under the CPA, though not a suit, yet the order by a Consumer Redressal Agency can be enforced in the same manner as a Court decree or order (Sec. 25 of C.P.A).

2. The Consumer Protection Act is in favour of the consumers only and hence public interest litigation for violation of fundamental rights shall not be entertained.

3. It is not necessary that the complaint should be made only by the consumer. A complaint may also be preferred by an agent of the consumer.

E.g.: A complaint made by a husband on behalf of the wife is maintainable.

4. If a complaint is not maintainable, opportunity should be given to the complainant to explain to the forum how it is maintainable.

5. The complaint should be specific in nature and not general.

6. Errors in drafting which are not fatal would be excused and the complaint would not be dismissed on that ground.

7. Complaint in the Consumer Redressal forums is maintainable for cases pending in a Criminal Court or MACT.

8. Court fee or process fee is not required for filing a complaint or for service of notice to the opposite party.

CASE CITATIONS:

1. ***Branch Officer, L.I.C of India Vs. Kanchanben Shan 1994:***

The Court held that if the complaint is against an Institution, Bank or Insurance Company, then the complaint should be made against the company, etc., and not upon the officers or managers of such institutions.

2. L.I.C. Vs. Zareena Sulaiman 1995:

The principle of **res judicata** as in the code of Civil Procedure is applicable here; so, a case which was already decided in one forum cannot be taken up in another forum.

3. Upbhokla Sarankshar Munch Vs. M/s Winds or Foods Ltd., 1993:

The complaint preferred under this Act should be from specific identifiable consumer or consumers. It cannot be on behalf of unidentified number of consumers from the public.

4. Executive Engineer, T.N.H Board Vs. T.N.H.B. Colony Maintenance and General Welfare Society 1993:

The Consumer Protection Act can be utilized only by the consumer and not by the person who renders service. For e.g., if A is a seller and B is a buyer, the C.P.A. is available for redress only to B (consumer) and not to A for realisation of money due for the goods.

5. Smt. Gurmit Kaur Vs. The Regional Officer, TTK Ltd., 1993:

The Consumer who seeks redressal from the Consumer Forum must come with clean hands. The complainant must not wilfully suppress facts or make misleading averments.

6. Dr. Suresh Chandra Vs. Maruti Udyog Ltd. 1994:

If a Complaint is dismissed in default without prosecution and not on merits of the case, a second complaint may be preferred and it doesn't amount to Res Judicata. Res Judicata is applicable only to decided cases.

7. *Smt. Pramila Sahoo Vs. Chittaranjan Mishra 1992:*

A mere complaint should not be treated as initiation of litigation but to settle the differences through the redressal agency.

8. *M/s Krishna Conductors Pvt. Ltd Vs. Andhra Bank:*

The complaint must be precise and clear. It should be coherent and should not be jumbled.

9. *Dr. Hari Mohan Swami Vs. M/s Modern Automobiles 1992:*

The allegations must be in written form; oral complaint is not possible. It should contain facts and also with a view to obtain compensation or any relief. It should not be vague and only to abuse the other party.

LIMITATION PERIOD FOR FILING COMPLAINT (Sec. 24-A)

The complaint should be filed within two years from the date of the cause of action. But on reasonable cause, the District forum, State Commission or the National Commission may entertain a complaint after the limitation period, recording the reasons.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Define the term 'complaint'. Explain the grounds on which a complaint can be made.*
2. *What are the essential requirements for a complaint?*
3. Write short note on: Complaint.

7. CONSUMER [Sec. 2(7)] AND CONSUMER DISPUTE [Sec. 2(8)]

A. CONSUMER [Sec. 2(7)]

"Consumer" means any person who

i. buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; (or)

ii. hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose.

Explanation —

a. The expression "commercial purpose" does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;

b. The expressions "buys any goods" and "hires or avails any services" **includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing;[Section2(7)].**

Essentials for 'Consumer':

Any person who 'consumes' or buys commodities or uses services is a Consumer. To fit into the definition of "consumer" in order to avail remedy under the CPA, the following essentials must be fulfilled:

1. **The consumer must buy some goods or hire or avail some services:**

   In Narasimha Reddy Vs. MD Maruti Udyog Ltd., it was held that a person who merely enters into agreement for purchasing goods is not a consumer. **Actual sale and purchase must have been completed.**

2. There should be consideration in the contract of sale/ service:

   Free goods shall not invoke the Consumer Protection Act. As per Sec. 2 (d) of the Indian Contract Act 1872, a contract without consideration is void ab initio.

i. *L.C. Malhotra Vs. J.C. Mehta and Company 1992:*

In this case, the complainant issued cheque for purchase of shares. Subsequently even before the shares were issued, the cheque was stopped from payment. Since there was no transfer of consideration, the complainant was not considered as consumer.

ii. *Consumer Unity and Trust Society, Jaipur Vs. State of Rajasthan (1991):*

Consideration paid by a Consumer should be freely given. It should not be compulsory. Tax is not considered as consideration for services.

3. **Deferred payment:**

Sainik service station Vs. Dr. Badriprasad Purohit (1992):

A person who goes to the Petrol bunk to get petrol is a potential user and hence he is a consumer. In the case of potential user, though price is not actually paid, consideration is impliedly promised or payment was deferred.

4. The payment should be made or promised to be made or partly paid and partly promised.

5. Any person who uses such goods with the approval or permission of such above mentioned buyer is also considered as a "Consumer".

Though there is generally privity of contract, and such other person is a stranger to the contract, he is considered to be a "Consumer" and can avail the remedy under the Consumer Protection Act.

6. Non Commercial Purpose:

A person who obtains goods must not use for re-sale or any commercial purpose. Similarly a person who avails services must not use such services for commercial purposes.

Amendment Act 2002 clearly explains commercial purpose. It reads:

"Commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment'.

I. WHO ARE CONSUMERS?

The following are consumers:

1. MAINTENANCE OF LIVELIHOOD:

Mr. S. Anusuya Vs. M/S Methodax Systems Pvt. Ltd. (1991):

In this case, after retirement, the consumer purchased xerox machine for job work and to maintain his livelihood. So, he was held to be a consumer and it was not considered as "commercial purpose".

2. **PERSONAL USE:**

M/S Essen Computers Ltd., Vs. Tagore Gracias (1994):

In this case, the complaint's wife bought a computer to prepare her Ph.D. thesis, and there was a defect in the computer.

The trader had defended himself by alleging that the computer was purchased for commercial purposes, but since the computer was used for her personal use and installed at home, it was held to be not for "commercial purposes" and hence the complainant was a consumer.

3. **RAISING CROPS FOR LIVELIHOOD:**

M.V. Arunachalam Chairman E.I.D.Parry Vs. Vellore Anjappa Mudaliar (1994):

An agriculturalist who buys seeds for raising crops for his livelihood was considered as consumer.

4. **USAGE FOR THE BENEFIT OF FAMILY:**

Smt. Lakshmi Sankaranarayanan Vs. M/s Indian Oil Corporation 1991:

In this case, L.P.G cylinder was booked in the name of one person who allowed it to be used by his sister for cooking for the benefit of the family.

Here, the sister also was held to be consumer, because she used the cylinder with the approval of her brother.

5. USAGE BY INDIRECT RATIFICATION:

Dinesh Bhagat Vs. Bajaj Auto Ltd:

The complainant was using the Scooter of the respondent for a long time but the respondent raised no objection to the complainant for such use.

It was held that this was indirect ratification of the act of the complainant, and hence he could be termed as a "consumer".

6. PERSONS WHO USE THE SERVICES FOR CONSIDERATION:

A person who uses the "Services" of another person for value or consideration is also a "Consumer". Any person who uses such services with the approval of such consumer is also a consumer.

In order to be considered as a "Consumer" under this Section -

i. Services should have been rendered to him.

ii. The Service should be hired by him.

iii. For hiring the Service, he should have paid consideration.

The meaning of "hire" is to "acquire the temporary use of a thing or the services of a person in exchange for payment". "Hiring" means letting of things or services for rent or for wages. It is a payment for labour or for the use of goods.

7. TENANT IN LIFT SERVICE:

Ganga Prasad Jaiswal and Another Vs. Kamal Sett & Others (1993):

It was a question whether a tenant is a consumer regarding lift service. It was held that such a tenant was a consumer as per the provisions of the Consumer Protection Act.

8. CUSTOMER OF A BANK:

A. P. Narayanan Vs. The Manager, UCO Bank 1991:

The customer who uses or avails of the services of a Bank is considered as a consumer.

9. COMMON CARRIER:

Patel Roadways Ltd., Vs. Birla Yamaha Ltd., A.I.R. 2000 S.C. 1461:

Consumer forums can entertain complaint against common carrier regarding loss of or damage to goods entrusted to carrier for transportation.

10. AN EMPLOYEE OF EMPLOYEES' PROVIDENT FUND SCHEME:

Regional Provident Fund Commissioner Vs. Shiv Kumar Joshi, A.I.R. 2000 S.C. 331:

An employee of Employees' Provident Fund Scheme is a consumer and for delay in release of provident fund, the employee can prefer a complaint.

11. Decided Case Laws:

The following persons have been held as consumers by decided judgments:

a. ***Basanta Kumar Sahoo Vs. Chief Commercial Manager (1998) 3 C.P.J. 286 (Ori):***

A railway passenger is a 'consumer'.

b. ***Jagdish Prasad Dagar Vs. Senior Divisional Manager, LIC (1992) 2 C.P.J. 493 (N.C.):***

Nominee under a policy of life insurance is a 'consumer'.

c. ***Sub Divisional Officer, H.S.E.B. Vs. Sita Ram (1992) 2 C.P.J. 819 (Haryana):***

A person using electricity for a commercial purpose is a 'consumer'.

II. WHO ARE NOT CONSUMERS?

1. For resale/commercial purpose:

A person who buys goods for resale or uses them for commercial purpose is not a consumer and hence cannot approach the Consumer forum for remedy under the Consumer Protection Act.

2. Buys goods in wholesale:

A person who buys goods in wholesale and sells them at retail price is a dealer and hence not a consumer.

Shri Lakshmi Narayan Rice Mills Vs. Food Corporation of India (1996) 1 C.P.J. 161 (N.C.):

A person purchased large quantity of rice. He cannot considered as a 'consumer', as such a large quantity cannot be for self-consumption but only for re-sale.

3. EDUCATION:

N. Taneja Vs. Calcutta District Forum, A.I.R. 1992 Cal. 95:

Education does not come within the purview of the Consumer Protection Act, 1986.

4. SUBSCRIBER OF LAW REPORTER:

Delhi Law Times Office Vs. Jagdish Prasad (1996) 2 C.P.J. 78 (Bihar):

Subscriber of a law reporter is not a consumer.

5. RECOVERY RIGHTS OF INSURER AFTER SETTLEME OF CLAIM TO CONSIGNOR:

Oberai Forwarding Agency Vs. New India Assurance Co. Ltd., A.I.R. 2000 S.C. 855:

An insurer compensated the consignor goods for loss of goods during transit and got his assignment. He is not a beneficiary of the services hired by the consignor from the carrier and hence not a consumer.

He could not maintain a complaint against the carrier of the goods. Even the addition of the consignor as a co-

complainant would not enable the insurer to maintain such a complaint.

6. PROCEEDINGS IN A CIVIL COURT:

Akhil Bhartiya Grahak Panchayat Vs. State of Gujarat (1994) 1 C.P.J. 114 (N.C.):

Institution of suit or other proceedings in a civil Court after payment of 'Court-fee' is not 'hiring' or 'availing of' service of a Court and hence a complaint is not maintainable before consumer forum on the ground that there were deficiencies in judicial administration.

7. CASE CITATIONS:

i. Installation of machinery for air pollution:

M/s Eagle Ultra - Marine Industries Ahmedabad Vs. Paramount Pollution Control, Baroda:

Designing and installation of machinery or system for air pollution control was held to be purchase for commercial purpose. It is held that he is not a consumer.

ii. Tools of a Doctor:

Dr. Pradeep Dutta Vs. M/s Larsen & Toubro Ltd (1992):

In this case, an ultra sound machine purchased by the Doctor was held to be for commercial purposes, and hence he was not a "consumer".

iii. Business purpose:

Shri Lakshmi Narayan Rice Mill Vs. Food Corporation of India (1996) 1 C.P.J. 161 (N.C.):

If a person is engaged in large scale business with a view to earn profit, buys any article for such business purposes, it is considered to be for "Commercial purposes".

iv. Profit making activity:

Chief Officer, UCO Bank Vs. Rabi Chakraborty (1993):

In this case, it was held that the purchaser of goods for resale purposes is not a consumer. The goods must have been purchased for being used in some profit making activity engaged in a large scale.

There should be close and direct "Nexus" between the purchase of goods and the profit making activity.

8. ILLUSTRATIONS BY DECIDED CASE LAWS:

The following decided case laws are illustrations for commercial purpose and hence the persons are not considered as consumers.

a. Purchase of goods for re-sale.

b. Purchase of V.C.R. for running video parlour.

c. Purchase of vehicle for running it as taxi.

d. Grant of stage carriage permit.

e. Purchase of Photocopier for commercial purpose.

f. Purchase of ultra sound scanner machine.

III. MEDICAL PROFESSION- "SERVICE" AND THE PATIENT - "CONSUMER"?

Prior to the judgment passed in ***Indian Medical Association Vs. V. P. Shantha and another***, the medical professionals contended that theirs cannot be termed as "service" and it is only a profession and hence cannot be covered under the Consumer Protection Act.

But the landmark judgment explained that medical profession is covered under the definition of "service" and the patient is a consumer except if the service is completely free ***(See Chapter No. 13, Page No. 428 - "Inclusion of Medical Services under the Act").***

Medical profession includes para medical services like Blood bank, druggists, etc.

M/s Cosmopolitan Hospitals Vs. Vasanth P Nair (1992):

It was held that legal representatives of a deceased patients consumers.

B. CONSUMER DISPUTE [Sec. 2(8)]

It means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint;

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Who is a "consumer" according to the Consumer Protection Act 1986?*
2. *Evaluate whether a person who buys goods for resale or uses goods for commercial purpose is a consumer as under the Act.*
3. *Who are consumers? Who are not consumers? Illustrate your answer with decided case laws.*
4. *State whether Medical profession is a service and patient is a consumer?*
5. *Short Note on: "Commercial purposes".*

8. CONSUMER RIGHTS [Sec. 2(9)]

"Consumer rights" includes—

i. the right to be protected against the marketing of goods, products or services which are hazardous to life and property;

ii. the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices;

iii. the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices;

iv. the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate fora;

v. the right to seek redressal against unfair trade practice or restrictive trade practices or unscrupulous exploitation of consumers; and

vi. the right to consumer awareness;

Other Rights:

A consumer has got **additional rights** which are as follows:

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vi. the right to consumer awareness;

Other Rights:

A consumer has got **additional rights** which are as follows:

1. A consumer can prefer a complaint before District Consumer Forum / State Commission/National Commission for defect in goods and for deficiency of service.

(Please refer Chapter No. 5,9 & 10, Page No. 386, 408 & 413)

2. A consumer can also prefer a complaint for unfair trade practice and restrictive trade practice.

(Please refer Chapter No. 11 & 14, Page No. 421& 441)

3. A consumer can become a member in the Centra Consumer Protection Council or State Consumer Protection Council or District Consumer Protection Council to promote and protect the rights of fellow consumers.

(Please refer Chapter No. 16, Page No. 463)

9. "DEFECT" IN GOODS [Sec. 2(10)]

"Defect" means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained under any law or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression "defective" is construed accordingly.

Explanation:

1. The term "Defect" is very wide and means any "Fault", "imperfection" or "Short Coming", such fault, etc, may relate to quality, quantity, potency, purity or standard of goods.

2. Such defect may arise due to

   a. deviation from a standard fixed by law in force, or

   b. from a standard claimed by the trader. Such claim may be express or implied.

3. A defect in the title to property or goods is not covered under this section. A defect in title to goods will not affect the quality or purity of goods.

Abhaya Kumar Panda Vs. M/s Bajaj Auto Ltd., (1991):

It was held that any vehicle may have manufacturing defects, and hence the terms in warranty for the free services is generally provided.

Manufacturing Defect:

i. ***Dr. Suresh Chandra Vs. Maruti Udyog Ltd., & Ors 1994):***

In this case, a car parked inside the garage of a bungalow caught fire. As it was proved that no external factors caused the fire, it was concluded that the fire was due to some inherent defect in the car, and the Manufacturing Company was held liable to pay damages to the complainant who was a medical practitioner.

ii. ***V.J. Antony Vs. Bajaj Tempo Ltd., (1991):***

A brand new vehicle was repaired five times in a period of 6 months from the date of purchase. It was held that it was at inherent defect in the vehicle and hence it could be compensated under the Consumer Protection Act.

5. It is generally assumed that many repairs during the warranty period proves inherent defect.

6. In cases where defect is to be laboratory tested, the defect shall be proved by such test. But in cases where the defect is visible for the naked eye, laboratory test need not be done to prove the defect.

i. ***Channan Singh Faujdar Vs. The German Remedies Ltd., (1992):***

Intravenous injection ampoule (Deriphyllin) was having a foreign body visible to the naked eye.

The complainant also produced a Doctor's certificate to that effect. It was held that as the foreign body was visible to the naked eye, it was a defect by deviation from the standard expected and claimed by the trader.

ii. ***Anup Kumar Alais Kailash Sharma Vs. S.M. Kanwar (1993):***

A bottle of Osto-Calcium B-12 syrup contained a fly inside. This was a clear case of defect in the manufacturing Company Glaxo India Ltd.

7. Sometimes "Defect" also includes non-delivery of goods after sale.

Estate Officer, HUDS Vs. Ram Sarup (1992):

At an auction sale, the consumer was the bidder and he won the auction bid, and deposited the amount as required for the purchase of the material in the auction sale. Even after 4 years, the material was not given to the consumer (bidder).

This was held to be clear defect in the auction sale.

8. Any defect known to the seller should be conveyed to the buyer at the time of sale.

i. ***Chitranjan Sahoo Vs. N.C. Jain 1993:***

In this case, white marbles were ordered but they lost their colour when polished. The seller here failed to make known such fact before sale, though such loss of

colour retention was possible in case of certain kinds of white marbles. So, held that it was a defect in goods as per Sec. 2 [1][f] of the Consumer Protection Act.

ii.Ramesh Chandra Biswal Vs. Commercial Tax Officer (1993):

In this case, the Registration Book had been lost, but the purchaser was not intimated about it at the time of sale by the seller.

The seller is under duty/obligation to disclose the loss of the Registration Book to the purchaser, and it was held to be a defect as per the Consumer Protection Act.

9. In the case of animals, if the yield of a particular animal is not up to its expected level, then it cannot be said that it is a defect under the Consumer Protection Act.

Warranties or Guarantees in terms of any animal cannot be absolute as it is not a machine, and the yield depends upon many circumstances.

The seller cannot be held liable under the Consumer Protection Act. The case may be dealt under breach of contract as it needs elaborate evidence.

10. In case of ornaments, the actual purity of the gold should be mentioned in the ornament.

M. Bhagwan Vs. Sri Krishna Jewellers (1992):

Marking different grades on the ornament and the Bill is held to be a defect under the Consumer Protection Act.

A consumer has got the following reliefs and remedies for 'Defect in Goods'.

1. A consumer can prefer a complaint before District Consumer Forum/State Commission/ National Commission for defect in goods.

2. A consumer can also prefer a complaint for unfair trade practice and restrictive trade practice.

3. A consumer can become a member in the Centra Consumer Protection Council or State Consumer Protection Council or District Consumer Protection Council to promote and protect the rights of fellow consumers for defect in goods.

10. DEFICIENCY IN SERVICE [Sec. 2(11)]

"Deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained under any law or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes-

i. any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and

ii. deliberate withholding of relevant information by such person to the consumer; [Sec. 2(11)]

EXPLANATION:

1. The definition of "Deficiency in Service" is very important as the Consumer seeks remedy under the Consumer Protection Act in the Consumer Forums for either "Defect" in goods or "Deficiency" in Services.

2. The potential consumer may sometimes perform his part of the contract but the other party may not accept the offer or may refuse to grant the services, and in such cases, it cannot be considered as "Deficiency" in service.

   In the same way, if service is impossible to be rendered, then it is not deficiency in service.

3. If one party holds some goods from supply for want of payment of the price of the goods, then it is not classified as "Deficiency in Service".

4. In certain situations lack of provision of certain facilities to a consumer amounts to deficiency in service.

i. Indian Airlines Corporation Vs. Abdul Majid & Another (1993):

In this case, three passengers who had got confirmed tickets were taken down from the aircraft by force. This was held to be deficiency in service on the part of the Airlines Corporation.

ii.Kamlakar Kashinath Badwa Vs. Maharashtra State Road Transport Corporation (1991):

The route buses had no boards to indicate the destination. Held it was deficiency in service.

5. "Service" includes all services like Banking, Public bodies, Insurance, Housing, Transport, Railways, Telephone, Education, Electricity, Municipal services, medical services, etc.

6. "Deficiency in Service" includes in it also undue delay in service causing mental and physical agony with loss of money.

i. Regional Manager, State Bank of India Vs. A. Periasamy (1992):

The delay of one year for rejecting an application for loan by Bank was held to be deficiency in service as per the Consumer Protection Act.

ii. Sunil Thapar Vs. Allahabad Bank & others (1992):

The Bank refused to honour a cheque because the signature in the withdrawal slip and the specimen signature available with it were not tallying. It is a measure to safeguard the interests of the Account holder, and hence not held as deficiency in service.

EXCLUSIONS FROM THE DEFINITION OF "SERVICE":

As per the definition of "service", the following service is not included under the Act:

I. CONTRACT OF SERVICE:

As per the law of Contracts, there is a wide difference between "Contract of service" and "Contract for service".

Contract for service means a contract in which one party undertakes to render services to another (like professional or technical) and in such performance, he is not directly under the constant supervision or contract or direction of the other person.

The party rendering service is at his own discretion and his skill and knowledge in accomplishing his work. On the contrary, a **contract of service** means a work performance by a party under the directions and constant control from the other party as to the mode and manner of work undertaken by him.

Here, the existence of master and servant relationship is implied. As per the definition in Sec. 2 (1) (o), the exclusion part says that contract of personal service is not included under the Act.

II. Free Services or Service Rendered Free of Charge:

As per the Indian Contract Act, every contract should be supported by consideration. ***"Ex nudo pacto non oritur actio"*** means "nothing arises out of a nude contract". Any contract should be backed by consideration without which it is void ab initio (from the very beginning).

The Consumer Protection Act being the basis of a special contract, there should be something in return or ***"quid pro quo"*** in between the parties.

Service rendered free of charge does not have consideration which is an essential to the contract between the Consumer and trader, or Professional and one who avails services and hence outside the purview of the Act.

'DEFICIENCY' IN VARIOUS FIELDS OF SERVICE:

1. Banks:

Wrong refusal or negligence in dishonouring of cheque, non purchase of outstation cheques upto Rs. 2, 500/-, delay in service, debiting the account of a consumer on the instruction of a third party, Bank issuing D/D without proper signatures, giving unsigned Bank Draft, refusal to pay maturity amount on account of financial stringency of the Bank, withdrawal of cash credit facility at the sweet will of the Bank, payment of cheque after receiving stop payment advice of the Bank, Non payment of deposit amount on maturity, etc.

2. Insurance Claims:

Regarding Insurance claims, failure of insurer to abide by the terms of the contract of insurance is deficiency in service. Other instances of deficiency are failure by the insurer to refund proportionate amount of unutilized premium amount, delay and default in settlement of insurance claim, non payment of settled claim, etc.

In the case of maturity of Insurance, delay invokes payment of interest to the insured. Manipulation in insurance policy and non settlement of claim is also considered as deficiency in service.

3. Mediclaim Insurance:

In the cases of Mediclaim Insurance, generally the policy does not cover previous ailment.

Lalit M. Bhanbhani Vs. The New India Assurance Company Ltd. 1994:

The burden of proof of previous ailment is on the insurance company.

4. Life Insurance:

Regarding Life Insurance, if there is undue delay without valid reason for payment of insurance money, an interest at 12% is allowed. Refusal to furnish information about insurance policy, bad behaviour of the L.I.C employee, poor maintenance of records of payment of premium, Rejection of loan application without legal basis, wrongful repudiation of insurance claim, etc., are all considered as deficiency in service.

L.I.C. Vs. V. Krishnamoorthy (1993):

Due to negligence of the L.I.C., insurance money was not paid in time. It was held in this case that defect in the machine cannot be accepted as a valid defence or excuse.

5. Cooking Gas Cylinders:

In the case of Cooking Gas Cylinder, the following are deficiency in Service:

Irregularity in such supply, denial of LPG connection for not having permanent residence, non supply of LPG Cylinder in time, LPG Cylinder causing accident due to negligence, Gas Agency sending unqualified mechanic, etc.

6. Postal Services:

Misdelivery of postal envelope, delay in delivery of speed post or registered post, delay in delivering insured parcel, Non receipt of acknowledgement, delivery of registered letter to different person, etc., are considered to be deficiency in service.

Mahendra Nath Basal Vs. The Superintendent of Post Office, Balurghat P.O (1993):

If the Post Master misappropriates the P.F money of a school deposited in the Post Office Savings Bank, Post Office is held liable for deficiency in service.

7. Public Bodies:

Public bodies like I.I.T, Companies, Municipality, Registration Department, etc., are all liable for deficiency in services.

Jayalakshmi Vs. Government of Tamil Nadu (1994):

In this case, Encumbrance Certificate issued by the Government Registration Department was defective as it did not show all the encumbrances in a particular property bought by the complainant.

Later on it was found that there were other encumbrances in the property. This was held to be a case of gross negligence on the part of the department.

8. RAILWAYS:

Charging of wrong rates, non provision of accommodation to reserved ticket holders, Railway reservation for the day in which the train did not ply at all, allotment of reserved berths of one person to another, not providing cushioned seats in I Class, changes of timing of Railway train without proper information, harassment of waitlist passengers by Railway Staff, etc., are all clear instances of Deficiency in service.

9. TELEPHONES:

Cases like telephone meter showing reading after disconnection, excessive billing, omission of name from directory, delay in service of defective telephone, non-receipt of telephone bills, disconnection of telephone without intimation, release of telephone connection not as per seniority, etc., are all held as deficiency in service according to the circumstances of the case.

A consumer has got the following reliefs and remedies for "Deficiency of Service ".

1. A consumer can prefer a complaint before District Consumer Forum/State Commission/ National Commission for deficiency in service.

2. A consumer can also prefer a complaint for unfair trade practice and restrictive trade practice.

3. A consumer can become a member in the Centra Consumer Protection Council or State Consumer Protection Council or District Consumer Protection Council to promote and protect the rights of fellow consumers for deficiency in service.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *What is "deficiency in service" as per the definition of the Consumer Protection Act?*
2. Explain the meaning and scope of the term "service" under the Consumer Protection Act. Give the exceptions.
3. *Short Notes on: "Deficiency", "services", "personal services".*

11. RESTRICTIVE TRADE PRACTICE (Sec. 2(41)

Restrictive trade practice means a trade practice which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include—

i) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;

ii) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent for buying, hiring or availing of other goods or services.

12. SERVICE [Sec. 2(42)]

"Service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;[Section 2(42)].

The **first part** gives statutory meaning of service and is very wide in its amplitude including every kind of service made available to any user who wants to avail the services by paying the consideration.

It applies to "any" service made available to "potential users".

"Any" connotes a wide meaning namely "all" and "potential" means "capable of coming into being", "possibility" and that which is probable to exist in future. Thus it covers not only users at present but those who can use in future.

The **second part** namely the inclusive part "and includes" is also wide and is subject to the services which can be covered in the I part of the definition. The purpose of widening the definition is to include also activities not commercial in nature but confers some benefit on the

consumer. It is not confined to only buying and selling transactions.

Regarding the medical profession, it was previously contended that the definition of "Service" as per Sec. 2 [1] [o] of the Consumer Protection Act does not include medical profession. But in the famous case ***Lucknow Development Authority Vs. M.K.Gupta,*** the definition of "Service" was derived and explained in detail.

So, as per the definition, "Medical Profession" is considered as "Service" except where consultation, diagnosis and treatment are completely without consideration.

The **third part** namely the exclusionary part says "except the rendering of any service free of charge or under a contract of personal service".

EXCEPTIONS TO DEFINITION OF "SERVICE":

There are two exceptions to the general definition of "Service". They are:

1. Rendering of any service free of charge.

2. Rendering of any service under a contract of "Personal service".

1. SERVICE FREE OF CHARGE:

As any contract without consideration is void abinitio. *"Ex nudo pacto non oritur actio"* **means, "Nothing arises out**

of a nude contract". Any contract should be backed by consideration, without which it is void ab initio (from the very beginning).

The Consumer Protection Act, being a species of Special Contract, there should be something in return or "quid pro quo" in between the parties.

Thus, any service rendered free of charge does not have consideration which is an essential to the contract and one who avails services and hence outside the purview of the Consumer Protection Act.

2. CONTRACT OF PERSONAL SERVICE:

There is a wide difference between "Contract of service" and "Contract for service".

Contract for service means a contract in which one party undertakes to render services to another (like professional or technical) and in such performance, he is not directly under the constant supervision or contact or direction of the other person.

The party rendering service has his own discretion and his skill and knowledge in accomplishing his work. On the contrary, a contract of service means a work performance by a party under the directions and constant control from the other party as to the mode and manner of work undertaken by him. Here, the existence of master and servant relationship is implied.

Thus, any service rendered to an employer by an employee in any circumstance falls within the exclusion part of the definition and it is not considered as "service" to attach liability under the Consumer Protection Act.

Regarding medical service, the judgement delivered in the famous case V.P. Shantha and others, points out that the employment of a medical officer for rendering medical services to the employer constitutes 'contract of personal service' and any service rendered by such medical officer to his employer under the contract of employment would be outside the purview of "service" as defined in Sec. 2 (1) (o) of the Act.

INCLUSION IN SERVICES:

According to the definition of "Service", the following were held to be "Service" as derived from decided case laws:

Advertising Agency (for Commission), Airlines, Allotment of plots, Banking, Financing for Industries, Car booking, Chit Fund Company, loan facilities given by Bank, Booking of Vehicles, Construction of houses, Courier service, imparting education, Electrical supply, Insurance, Postal service, Public Bodies, Railways, Repairing of things, shares trading, Telephone, transport of goods, water supply, etc.,

1. PUBLIC BODIES:

The public sector is obliged to provide quality in its services. People are aware of their rights as they pay tax, and hence they expect good commodities as a consumer and to avail a decent service for the value they spend.

2. MEDICINE:

Doctors have reason for feeling proud of rendering a service, which is prestigious and service oriented. Naturally, as every field is in roaded with malpractice, lack of professional standard, deficiency, etc., a small percentage of Doctors falter in their responsibility towards humanity and do not abide by the Hippocratic oath they are bound by.

Commercialisation, lack of merit, failure to exercise reasonable care, are some of the factors responsible for dereliction of duty by a Doctor, but their service is one in which they owe utmost liability and unflinching responsibility.

3. TRANSPORT:

Loss of life of innocent people due to the negligence of the drivers and the bad condition of the highways with poor lighting facilities, presence of obstacles like big stones, dead animals, stray cattle, etc.

CASE CITATIONS:

i ***N. Taneja Vs. Calcutta District Forum A.I.R. 1992 Cal. 95:***

The relationship of 'teacher and student' in an educational institution is not a service on hire.

The student is not an economic consumer nor a buyer of any economic goods. The term hire cannot be linked with education i.e., teacher and student.

ii. Vimal Chandra Grover Vs. Bank of India A.I.R. 2000 S.C. 2181:

Grant of overdraft facility by bank to its customer, is subject to consideration namely interest and hence amounts to providing of 'service'.

iii. Additional Director CGHS Vs. R.L. Butani (1996) 1 C.P.J. 255 (N.C.):

The services rendered by the Government servant under the Central Government Health Scheme are not covered by the term 'service' as defined in the Act.

iv. Akhi Bhartiya Grahak Panchayat Vs. State of Gujarat (1994) 1 C.P.J. 114 (N.C.):

(Please refer Chapter No. 6 - 'Consumer' Page No. 43)

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Define 'service' as per the Consumer Protection Act.*
2. *What are the essential parts of the definition of 'service' as per the Consumer Protection Act? State the exceptions to the definition of 'service'.*
3. *Short Note on: Service.*

13. INCLUSION OF MEDICAL SERVICES UNDER THE ACT (MEDICAL NEGLIGENCE)

SYNOPSIS:

A. Introduction

B. Medical Profession as "Service" - as defined in the Consumer Protection Act

C. Supreme Court's Rulings

D. Categorisation of Medical practitioners a nd Hospitals

E. Medical Negligence

F. Conclusion

A. INTRODUCTION:

Till November 13th 1995, it was a much debated question whether medical profession can be included under the term "Service" as per the Definition of Consumer Protection Act.

But the Supreme Court passed the judgement on November 13th 1995 in the famous case ***Indian Medical Association Vs. V. P. Shantha and others*** and cleared away all doubts in the application of the Consumer Protection Act in the medical profession.

Thus medical profession has come to be included under the wing of the Act.

B. MEDICAL PROFESSION AS "SERVICE" - AS DEFINED IN THE CONSUMER PROTECTION ACT:

Definition of Service:

It means "service" of any description which is made available to the potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both (housing & construction), entertainment, amusement or the purveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service.

The Lucknow Development Authority Vs. M.K. Gupta was the landmark in explaining the definition of "service" in a clear manner. As per the **definition of "service"**, it is divided into three parts:

The **I part** namely **main clause** is very wide and applies to "any" service made available to "potential users". "Any" connotes a wide meaning namely "all" and "potential" means "capable of coming into being", "possibility" and that which is probable to exist in future. Thus, it covers not only users at present but those who can use in future. Thus, the I part itself makes the medical profession as service and the patients as consumers.

The **II part** namely the **"and services"** is also wide and is subject to the services which can be covered in the I part of the definition.

The purpose of widening the definition is to include also activities not commercial in nature but confers some benefit on the consumer. It is not confined to only buying and selling transactions. The medical profession, though not expressed in the inclusive part of the definition, can be understood as being included from the I part and III part of the definition.

The **III part** namely the **exclusionary part** says "except the rendering of any service free of charge or under a contract of personal service". The medical profession is considered as service - **except where consultation, diagnosis and treatment is completely without consideration.**

The contention of medical professionals was that the medical professionals are not engaged in occupation rendering service which is covered under Sec. 2 (1) (o) and that theirs is a profession and not covered by the provision of the Consumer Protection Act.

They argued that their practice was subject to the provisions of the Indian Medical Councils Act and the ethics made by the Medical Council of India, approved by the Government of India. They contended that their conduct is already regulated by the rules under the Indian Medical Council.

The strong debate came to an end on November 13th 1995, which reiterated beyond doubt that medical profession is "service" as per the Consumer Protection Act under certain conditions.

C. SUPREME COURT'S RULINGS:

The Supreme Court decided and passed the ruling on November 13th 1995, in ***Indian Medical Association Vs. V.P. Shantha & others*** as follows:

a. "Service" rendered to a patient by a medical practitioner (except where the Doctor renders service free of charge to every patient or under a contract of personal service) by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of "Service" as defined in Sec. 2 [1] [o] of the Act.

b. Service rendered free of charge by a medical practitioner attached to a Hospital/Nursing Home where such services are free of charge to everybody is not "Service" as per the definition.

However in ***C. Ranganathan and others Vs. Government of Tamil Nadu 2006 ACJ 2087,*** the Madras High Court held, 'free treatment of patients in government hospital does not disentitle them from compensation for loss due to negligent acts of authorities'

c. If charges are paid by the persons in such services, then it is not covered under the definition of "service".

d. If a Non-Government Hospital/Nursing Home renders free service for some patients as well as service for payment for some patients it is covered under the definition of "Service".

e. Complete "Free Service" rendered for all patients by a Government Hospital/Health Control/Dispensary is not covered in the definition of "Service".

If such Government Hospital/Health Centre/Dispensary renders service for payment as well as free service, it is covered under the definition of "Service".

D. CATEGORISATION OF MEDICAL PRACTITIONERS AND HOSPITALS:

According to the Supreme Court's Rulings, medical practitioners and hospitals are categorised as:

1. Services rendered free of charge to every body availing such services.

2. Services rendered by collecting charges from everybody availing the services.

3. Service rendered free of charge for certain category of persons who cannot pay, and service rendered by collecting charges from some category of persons who can pay.

Regarding point No. 1, they are not included under the definition of service as per the Consumer Protection Act and hence for any medical negligence on the part of the Doctor or Hospital, Nursing Home, etc., rendering service free of charge, the Consumer Protection Act cannot hold him liable for loss or injury, as there is no consideration between the Doctor and the patient.

Regarding the point No.2 where charges are paid by everybody availing the services, it is clear that these persons are covered under the definition of "service" under the Consumer Protection Act and hence the Doctors and Hospitals rendering such services are held liable for medical negligence.

Regarding the point No. 3, where charges are paid by some and not paid by those who cannot, the service rendered by such Doctors or services falls within the purview of the definition of the Act. Actually, here, for the patients who are rendered free services, there is no consideration.

But as the consumers are treated as a class, and if there is difference in treatment within the same hospital between a paid patient and unpaid patient as to the mode of diagnosis, medication, etc., it is not justified as per the object of Consumer Protection Act.

Here, it is construed as if the payment made by those who pay for availing services, is directed to some extent towards those who cannot pay. Thus, all persons who avail of services by the Hospitals or Doctors as per the point No. 3 are all covered under the Consumer Protection Act.

Though the Government Hospitals may not be commercially motivated, they cannot be treated differently and hence if they render free of charge service to some and service for charge for some, they are covered under the Act.

The patients who do not pay are classified as "beneficiaries" of the service which is hired or availed of by the "paying class". The beneficiaries are also covered within the definition of "Consumer" under Sec. 2(1)(d) of the Act.

E. MEDICAL NEGLIGENCE:

In treating a medical case, a doctor is expected to exercise that degree of care and skill which would be used by a reasonable and prudent doctor in the same or similar circumstances.

It is not sufficient to establish legal responsibility that injury followed negligence but it must also be shown that the negligence was sufficiently related to the ultimate damage and that, as a matter of public policy, liability should be imposed.

Professional negligence or medical negligence is defined as want of reasonable degree of care and skill or willful negligence on the part of the medical practitioner in the treatment of a patient with whom a relationship of professional attendant is established, so as to lead to his bodily injury or to the loss of his life.

POINTS EVOLVED FROM DECIDED CASE LAWS:

1. **Negligence must be shown to be the cause of the ultimate injury. The following chain should be there: existence of duty – standard of care – breach of duty – injury – casual connection between breach of duty and ultimate injury – the measure of damages.**

S.B. Venkatappa Vs. Kasthuri S. Shallikeri, major and another:

Smt. Lakshmamma, wife of complainant underwent 4th delivery wherein the baby was found dead in the womb.

The Doctor removed the dead baby by Caesarian operation and tubectomy was also done on consent by the husband of the patient.After four months of discharge, the patient died in ETCM hospital due to "irreversible septic shock".

Since there was no casual connection between the death of Smt. Lakshmamma and the operation held before four months in BEML Hospital, the Karnataka State Commission, Bangalore, held that there was no deficiency of service in this case.

2. Negligence on the part of the physician must be proved to attach liability and get compensatory remedy.

Dhilip Narayan Bhelande Vs. Dr. Prakash N. Pant (1993):

The complainant could not prove that the suffering he underwent was directly due to the injection. Here, the doctor could not be held responsible for the loss or injury caused to complainant and hence no compensation was awarded.

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3. If there is no material evidence on record, allegation of medical negligence will not be entertained.

i. Akhil Bhartiya Panchayat Vs. Dr. Jog Hospital (1993):

The complainant was operated upon 10 years ago at Ahmedabad for some ailment. She could not prove that her pain increased after the operation, and there had been any negligence on the part of the Doctor.

ii. Yasman Sultana and another Vs. Dr. Rupaben D. Patel and another (1994):

The complainants could not successfully prove by medical evidence that the Doctor was guilty of medical negligence; on the contrary, the Doctor proved that he had exercised due care and caution and proper treatment was given to the complainant and child. Held there was no deficiency.

iii. Jacob Mathew Vs. State of Punjab and another (2005) ACJ 1840:

The Supreme Court held 'To prosecute a medical professional for criminal negligence, it must be shown that the doctor did something or failed to do something which in the given facts and circumstances, no medical professional in his ordinary senses and prudence would have done or failed to do'

4. Undue delay on the part of the Doctor should be proved.

i. In Md. Aslam Vs. Ideal Nursing Home and other (1994):

The complainant contended that his deceased wife was not given immediate treatment and adequate care, as a result of which she died. He complained that though operation was an emergent one, there had been a delay of 4 hours, and hence alleged that there had been negligence.

But the Court held that since blood and other arrangements had to be made, a delay of 4 hours was not abnormal in this case, and there had been no negligence on the part of the Doctors or the Nursing Home.

ii.Amir Ali Sha Vs.St. Johns Medical College Hospital (1988):

Held that the time needed for preliminary and necessary tests before surgery cannot be condoned as undue delay or negligence.

5. If the technique of treatment is a well-recognised one, the Doctor is not guilty of negligence or deficiency of service.

The injury is not negligence simply because one of the risks inherent in an operation actually took place or because in the matter of opinion, he made an error of

judgment. He is guilty only when he has not exercised the standard of reasonable medical care.

6. **The term "medical profession" includes para medical services like blood bank, druggists, etc.**

i. Haresh Kumar Vs. Sunil Blood bank (1991):

The blood purchased from blood bank had failed to test the blood before storing and caused discomfort to the complainant and his wife. The forum awarded Rs. 20,000/- as damages to the complainant and his wife and Rs. 1,000/- to the complainant as costs.

ii. Sunakas Bhot Vs. Amar Drug House (1992):

In this case, the chemist was held liable for selling medicine which was not prescribed by the Doctor.

7. **Misrepresentation by a Doctor that he possesses the skill or expertise which he does not possess is negligence and for any loss or injury, compensation is awarded.**

E.g., amputating a wrong limb, giving allergic medicines, wrong diagnosis which cannot be justified, etc. If an unqualified person attends to a serious case which cannot be handled by him, he is considered negligent.

8. If excessive billing or charges are levied for which no service was performed, it is considered as deficiency of service and the Hospital has to refund the same to the complainant.

Motibai Dalvi Hospital Vs. M.I.Govilkar (1992):

Surcharge of Rs. 1,164/- was levied at 15% on the total bill which was not accountable by the Hospital as justified. The amount was refunded to the complainant.

9. *Post operative care* and *follow up* is as essential as the surgery itself. If a doctor performs surgery and does not show responsible care after surgery, it is deficiency in service and he is liable for damages.

B. Shekar Hegde Vs. Dr. Sudhaamshni Battacharya:

The negligence in taking post operative care was very gross and the complainant developed pus in the chest region for want of post operative care. It was even sufficient in the ordinary course of nature to cause his death.

So, again another operation was performed on the rib from the chest region and the infected rib was removed. This was held as deficiency within the meaning of the Consumer Protection Act.

F. CONCLUSION:

The liability of medical practitioners and hospitals is not new, as they are already liable under the civil and criminal penal laws.

The Consumer Protection Act is a measure for quick and inexpensive disposal of medical negligence cases, which may be very lengthy and expensive in the judicial Courts.

All the principles governing civil liability on negligence also applies as far as the Consumer Protection Act is concerned.

Statistical data collected regarding cases of medical negligence in the Civil Court are but a few in number, due to the expenses involved and the time consumption. Since the Consumer Redressal forum is inexpensive and fast in its mode of disposal of cases, persons who have suffered due to medical negligence by doctors may get a chance of remedy.

The advent of the Consumerism in the field of medicine is a welcome step as far as the common man is concerned and it is hoped that the Act shall give a helping hand as expected. Though the inclusion of the medical profession under the wing of the Consumer Protection Act has given a temporary jolt to the Doctors, they should visualise this measure as a signpost in the social development of our country.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *State the provisions as to how the medical services were included under the wing of the Consumer Protection Act.*
2. *Can the Consumer Protection be extended to medical services? Discuss.*
3. *Explain the concept of medical negligence which make doctors liable under the Act.*

14. UNFAIR CONTRACT AND UNFAIR TRADE PRACTICE [Sec. 2(46) & [Sec. 2(47)]

A. UNFAIR CONTRACT:

Sec.2(46)of the Consumer Protection Act, 2019 defines Unfair Contract. It reads -

"Unfair contract" means a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other hand, causing significant change in the rights of such consumer, including the following, namely:—

i. requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; (or)

ii. imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; (or)

iii. refusing to accept early repayment of debts on payment of applicable penalty; (or)

iv. entitling a party to the contract to terminate such contract unilaterally, without reasonable cause; (or)

v. permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; (or).

vi. imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage; [Section2(46)]

B. UNFAIR TRADE PRACTICE:

Sec. 2(47)of the Consumer Protection Act, 2019 defines **Unfair trade practice and it reads -**

"Unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

i. making any statement, whether orally or in writing or by visible representation including by means of electronic record, which—

a. falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

b. falsely represents that the services are of a particular standard, quality or grade;

c. falsely represents any rebuilt, second hand, renovated, reconditioned or old goods as new goods;

d. represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not really have;

e. represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not really have;

f. makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

g. gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof.

However, if a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence lies on the person raising such defenc.

h. makes to the public a representation in a form that purports to be—

i) a warranty or guarantee of a product or of any goods or services; or

ii) a promise to replace, maintain or repair an article or to repeat or continue a service until it has

achieved a specified result, if such warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

i. materially misleads the public concerning the price at which a product or services, have been ordinarily sold or provided, and, for this purpose, a representation as to price is deemed to refer to the price at which the product or goods or services have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

j. gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation - A statement that is,

a. Expressed on an article offered or displayed for sale, or on its wrapper or container; or

b. Expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or

c. Contained in anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, is deemed

to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

ii. permitting the publication of any advertisement, whether in any newspaper or otherwise, including by way of electronic record, for the sale or supply at a bargain price of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation.— "bargain price" means,—

a. a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise; or

b. a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;

iii. permitting—

a. the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged, in the transaction as a whole;

b. the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting the sale, use or supply of any product or any business interest, except prescribed contest, lottery, game of chance or skill;

c. withholding from the participants of any scheme offering gifts, prizes or other items free of charge on its closure, the information about final results of the scheme.

Explanation.—

The participants of a scheme is deemed to have been informed of the final results of the scheme, if such results are within a reasonable time published, prominently in the same newspaper in which the scheme was originally advertised;

iv. permitting the sale or supply of goods intended to be used by consumers, knowing that the goods do not comply with the standards prescribed by the competent authority relating to performance, composition, contents, design, constructions, necessary finishing or packaging to prevent or reduce the risk of injury to the person using the goods;

v. permitting the hoarding or destruction of goods, or refusal to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises the cost of those or other similar goods or services;

vi. manufacturing of spurious goods or offering such goods for sale or adopting deceptive practices in the provision of services;

vii. not issuing bill or cash memo or receipt for the goods sold or services rendered in prescribed mannèr;

viii. refusing, after selling goods or rendering services, to take back or withdraw defective goods or to withdraw or discontinue deficient services and to refund its consideration, if paid, within the period stipulated in the bill or cash memo or receipt or in the absence of such stipulation, within a period of thirty days;

ix. disclosing to other person any personal information given in confidence by the consumer unless such disclosure is made in accordance with the provisions of law. [Section2(48)].

Consumers are nowadays cheated, exploited and misled by false Advertisements, bait Advertisements and gifts, discounts, etc., which compromise quality for consideration.

The consumers are induced to gamble and buy unnecessarily more things than required, due to the cheap price of the goods. Unfair trade practice leads to unhealthy competition, as people are attracted towards cheap products.

Meaning:

It means a practice, which adopts any unfair method or deceptive practice including the below mentioned practices for promoting sale, use or supply of any goods or for the provision of any service.

Oral or written false representation:

False and **misleading** representation means literally - untrue representation leading the consumer to infer something which is, not actually true. Advertisement must be of such a nature as to promote competition rather than hindering it.

It is a marketing strategy, required to promote sales. Advertisement is a message, which has to be repeated often, as to educate the consumers of the availability of their products.

The mode of representation may be in any method, and it is enough if the buyer comes to know of it. The representation may be on the article, wrapper or container, or anything attached to the article.

The advertisements which tend to mislead the public of foreign collaboration, false description regarding standard of a product, representation as to composition of the products (artificial silk represented as "silk") are unfair trade practices. The MRTP deals also with false representation as to standard of services.

E.g.: A person may falsely represent that he has a certain professional qualification, which he does not have. It also deals with trade in which old goods reconditioned or rebuilt may be described as new ones.

It was an unfair trade practice making any false representation that the services are of a particular standard, quality or grade.

Instances of unfair trade practice:

The following ten instances are considered to be false or misleading representation and thus unfair trade practice:

i. Making any false representation that the goods are of a particular standard, quality, quantity, grade, composition, style or model. Eg.: Advertisements like herbal products curing diabetes, baldness, grey hair, increase of height, loss of weight, etc.

Pichandi Thandapani Vs. M/s Regency Travels 1994:

The Regency Travels Company advertised in the Newspaper that they are authorized under the Emigration Act to provide Emigration visa, along with other services and employment in Gulf Countries. The consumer had paid part payment of Rs. 24,000/- for the services.

It was found that the Travels Company did not have any authorisation under the Emigration Act. The Company was held to be guilty of unfair trade practice as they

had advertised for emigration without holding authorisation for the same.

Director General of Investigation and Registration Vs. Travancore Finance and Exchange Company: (1989):

Advertisement was made which was high sounding and attractive high interest for getting deposits from the public and reinvesting them in more profitable business. The advertisements contained misleading statements and promises affecting the public interest. The Commission held that it was an unfair trade practice.

E.g.: Schools or Colleges advertising of facilities which they do not provide, medical companies advertising that they pro vide cure for cancer, aids, etc.

ii. making false representation that the services or of a particular standard, quality or grade.

The services includes all services as specified in Sec. 2(i)(o) like banking, insurance, transport, etc.

iii. making any false representation of certain second hand, renovated, rebuilt or old goods as being new ones.

iv. making any false representation that certain goods or services have sponsorship, approval, performance, uses or benefits, which they do not actually have.

Eg.: Issue of false prospectus by some fake Companies who get investments from innocent people and cheat them. False Advertisements by certain colleges that they are affiliated to reputed Universities, which is not so.

In DGIR Vs. Ravi foundation, it was held that a representation by a dietitian that by a course of diet prescribed by him, a woman could beget a child of her choice was an unfair trade practice.

Director General Vs. Roche Products Limited:

A medical product was advertised to have absorption of iron 6 times more. This induced doctors to prescribe the medicine to pregnant ladies, which was not actually proved to be so effective. So this was held to be unfair trade practice and hence restricted.

v. Making any false representation that the seller or supplier has sponsorship or approval which such seller or supplier does not have. Eg., a dealer representing that he is authorised by the manufacturer, to sell his products, but actually not being so authorised.

Acupressure Therapy Health Centre Case:

In this case, the manufacturer of acupressure sandals advertised that their sandals improved blood circulation, and maintains good health if used 8 minutes in the morning and evening before meals.

They also claimed to have got the approval of the World Health Organisation (WHO) for this therapy.

The All India Institute of Medical Sciences opined that there was no evidence as to the facts claimed by the manufacturer. Also, the WHO disclaimed granting approval to the use of such sandals.

It was held that the facts mentioned in the Advertisements were misleading and hence it was an unfair trade practice.

vi. making false misleading representation regarding the need or usefulness of any goods or services.

E.g.: Advertising that a vehicle can run 100 kms per hour whereas the efficacy was only for 50 kms per hour.

vii. Giving a false guarantee or warranty of the performance, efficacy or life span of a product based on inadequate proof or test. E.g: A car manufacturer gives a guarantee that the car shall give 25 kms per hour whereas it gives only 10 kms per hour.

viii.(a) making a false, misleading representation in the form of a warranty or guarantee of a product or of any goods or services, or (b) a promise to replace or repair an article (or a part of it) or continue a service until a specified result is achieved, where such warranty or guarantee or promise shall not be carried out.

E.g., a washing machine manufacturer or a stereo re corder manufacturer declares that his product is completely trouble free, and if at all there is any defect, he shall replace it.

In such a case, if the manufacturer does not replace the product in times of such defect, it is unfair trade practice.

Denard Vs. Smith:

In this case, a computer was offered with a software package including a number of games. This was not completely fulfilled during delivery. This was held to be violative of the MRTP Act (false representation as to composition).

ix. misleading the public as to the price at which a product or goods or services are sold or have been sold. E.g: Enhancing the rate of sarees, dress materials and other items and then offering 35%,40% discount to buyers is a trick played on consumers. Also advertising that the goods are of export quality, etc., which is also false.

x. making false misleading statements lowering the value of goods or services or trade of any other person. Such statement must be displayed on the article or its wrapper or container or anything attached to the article or in any other manner made available to a member of public.

False offer of bargain price:

Publication of advertisement in any media, for goods or services which are offered at a bargain price without intention of actually giving it at that price for a reasonable period or reasonable quantity.

"Bargain price" is that price which the seller wants to show as a lesser price than the ordinary price. The person who reads the Advertisement would also feel that the price quoted therein is very reasonable and attractive.

In re Polar Industries Ltd:

In this case, Polar ceiling fans were offered for a discount of Rs. 45/- as sales promotion campaign.

The discount was measured on the basis of the price which would prevail next summer and not on the basis of the price existing that year.

This information was given at the corner of the Advertisement in very small letters.

Generally, people tend to think that discount will be offered on the existing price, but in this case, though the discount was offered on future prices, the advertisement was twisted so that it appears to the consumers that the discount is given on the existing price. The Commission held that it was an unfair trade practice.

In some cases, the manufacturer offers heavy discount on the cost of the goods but increases the cost of the goods. This also amounts to unfair trade practice.

In **M/S Snowhite Clothiers,** New Delhi case, an advertisement of 50% discount on clothes was offered. The Company had manipulated the prices by adding high mark up on the cost price of the goods. Such advertisement was prevented from being published in future.

In another case, the Commission held that while advertising for discount sales, the normal price and the quality of the goods offered should be mentioned.

In the case of Panama traders, the discount was very heavy that it was improbable and unbelievably low. On enquiry, it was found that the clothes were old stock bought from various mills and sold at a profit of 10 to 12%. Such an advertisement was held to be misleading and false offer.

From cases decided, the following guidelines were evolved:

a. The advertisement should mention the period of discount sale. It should be reasonable and not less than ten days.

b. The normal price of the goods offered for sale and the bargain price at which they are offered should be mentioned with categories of discount offered.

c. The advertisement should mention the items for which maximum discount and minimum discount are offered.

Offer of gifts, prize, etc.:

i. Permitting the offering of gifts, prizes or any other items with no intention of offering them in reality, or creating an impression that some article is given free of cost but fully or partly covered in the charge itself.

ii. Conducting any contest, lottery, game of chance or skill to promote directly or indirectly the sale or use or supply of any product of business interest.

iii. Withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure the information about final results of the scheme.

Society of Civil Rights Vs. Colgate Palmolive India Ltd.:

In the case of Colgate Palmolive (India) Ltd., a scheme in which the consumers were persuaded to buy two trigard tooth brushes for entry into a contest. The contest was in the nature of lottery as early birds were awarded which did not depend upon any skill.

This scheme was considered to be in violation of public interest, as the public was persuaded to by things, which they do not need for the time being, or do not need in the quantity they are forced to buy. Held it was violative of M.R.T.P. Act.

Achal Kumar Galhotra Vs. Byford Motors Ltd.:

In this case, false impression as to comparative prices was made. The Scheme of offer that Premier Padmini Car was at Rs. 25,000/- less than the price of Maruti was found to be false.

There was an offer of free stereo in the car; but it was found that it was indirectly recovered by increasing the registration charges. Also, there was another scheme of a draw of lucky number to get a new car in exchange of an old one. It was not permissible, as it was a lottery.

Violation of prescribed standards:

Permits sale or supply of goods intended to be used by consumers knowing that they do not have the standards prescribed by competent authority relating to performance, composition, contents, design, etc., necessary to prevent risk of injury to the person using the goods.

Hoarding, Destruction or Refusal:

Hoards (accumulates) goods or permits the hoarding of goods or destroys them or refuses to sell the goods or refuses to make them available for sale or to provide any service, and if such hoarding, destruction or refusal tends to raise or raises or is intended to raise the cost of those goods or other similar goods or services.

Manufacture of spurious goods or offering such goods for sale or adopting deceptive practices in the provision of services is also unfair trade practice.

Instances - not Unfair Trade Practices:

The following instances are not unfair trade practice:

1. Use of exaggerated terms and descriptions in advertisements is not an unfair trade practice. It is natural that an advertisement should be able to invoke interest to buy the product advertised. E.g., advertising a TV to be the best one, Washing machine to be "failure free", etc.

2. Exaggerating the efficacy of medicines for promoting sales is not an unfair trade practice. E.g., expressing an ayurvedic medicine as improving sex disorders, and potency is not unfair trade practice, provided the contents of the medicine are displayed.

3. Description of manufacturer with well known products is not an unfair trade practice.

   When the intention of the advertisement is not to cheat the consumer and when it is not misleading, it cannot be categorised as being an unfair trade practice.

4. Genuine gift schemes which does not affect the consumer in any manner is not an unfair trade practice.

5. Genuine sales promotion schemes like organizing a contest, by spending a reasonable amount on the reward of the winner of the contest, etc., is not an unfair trade practice.

6. Genuine discount sales without injuring the consumers is allowed and held not to be an unfair trade practice.

7. Attracting consumers by providing comparative information about the same products of other brands which is not false, is not an unfair trade practice.

8. Any repairs in the product after the warranty period cannot amount to unfair trade practice.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the terms Unfair trade, Unfair trade practice.*
2. *What are the acts that constitute . Unfair contract and Unfair trade Practice?*
3. *Write short note on - a) Unfair contract b) Unfair trade practice.*

15. MONOPOLISTIC TRADE PRACTICE

A monopolistic trade practice is a trade practice, which has or is likely to have the effect of:

i. Maintaining the prices of goods or charges for the services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or services;

ii. Unreasonably preventing or lessening competition in the production, supply or distribution of any goods or services whether or not by adopting unfair method or fair or deceptive practices;

iii. Limiting technical development or capital investment to the common detriment;

iv. Deteriorating the quality of any goods produced, supplied or distribute; and

v. Increasing unreasonably -

   a. The cost of production of any good; or

   b. Charges for the provision, or maintenance, of any services; or

   c. The prices for sale or resale of goods; or

d. The profits derived from the production, supply or distribution of any goods or services.

A monopolistic trade practice is prejudicial to the public interest.

INQUIRY INTO MONOPOLISTIC TRADE PRACTICES:

The Commission may inquire into an monopolistic trade practice-

1. A reference made to it by the Central Government or

2. Upon an application made to it by the Director General or

3. Upon it own knowledge or information

RELIEF AVAILABLE:

a. If the inquiry by the Commission reveals that the trade practice inquired into operates against public interest, the Central Government may pass suitable orders to remedy any mischief resulting from such trade practice.

b. On an inquiry report of the Commission, the Central Government may-

   i) Prohibit the owner(s) of the concerned undertaking(s) from continuing to indulge in a monopolistic trade practice; or

   ii) Prohibit the owner of any class of undertakings or undertakings generally, from continuing to indulge

in any monopolistic trade practice in relation to the goods or services.

c. The Central Government may also make an order:

i. Regulating the production, storage, supply, distribution, or control of any goods or services by an undertaking and fixing the terms of their sale (including prices) or supply;

ii. Prohibit any act or practice or commercial policy which prevents or lessens competition in the production, storage, supply or distribution of any goods or services;

iii. Fixing standards for the goods used or produced by an undertaking;

iv. Declaring unlawful the making or carrying out of the specified agreement;

v. Requiring any party to the specified agreement to determine the agreement within the specified time.

vi. Regulating the profits which may be derived from the production, storage, supply, distribution or control of any goods or services; or

vii. Regulating the quality of any goods or services so that their standard does not deteriorate.

16. CONSUMER PROTECTION COUNCILS (Sec 3 to Sec 9)

SYNOPSIS:

A. *Introduction*
B. *Establishment of Consumer Protection Council (Sec. 3)*
C. *Meetings of Central Council (Sev. 4)*
D. *Objects of the Central Council (Sec. 5)*
E. *Establishment, Constitution and Meetings of State Consumer Protection Council(Sec. 6)*
F. *Objects of every State Council (Sec. 7)*
G. *Establishment,Constitution and Meetings of District Consumer Protection Council (Sec. 8)*
H. *Objects of every District Council(Sec. 9)*

A. INTRODUCTION:

To protect the rights of consumers and formulate policies for incorporation in the field of consumerism and improve the quality of goods and services, the Consumer Protection Councils are established.Their opinions are recommendatory in nature and may be adopted by the Government for the welfare of the consumers.

The Central Government is authorised to establish a "Central Council" under Sec. 3 of the Consumer Protection

Act, 2019 and the State Government is authorised to establish "State Consumer Protection Councils" under Sec. 6 of the Consumer Protection Act.

The State Government is authorised to establish "District Consumer Protection Councils" under Sec. 8 of the Consumer Protection Act.

B. ESTABLISHMENT OF CONSUMER PROTECTION COUNCIL (Sec. 3):

1) The Central Government establishes with effect from specified date the Central Consumer Protection Council to be known as the Central Council.

2) The Central Council is an advisory council and consists of the following members, namely:—

a) the Minister-in-charge of the Department of Consumer Affairs in the Central Government, who is the Chairperson; and

b) prescribed number of other official or non-official members representing consumer interests

C. MEETINGS OF CENTRAL COUNCIL (Sec. 4):

1) The Central Council meets as and when necessary, but at least one meeting of the Council is held every year.

2) The Central Council meets at suitable time and place and observes prescribed procedure in regard to the transaction of its business.

D. OBJECTS OF CENTRAL COUNCIL (Sec. 5):

The objects of the Central Council is to render advice on promotion and protection of the consumers' rights under this Act.

E. ESTABLISHMENT, CONSTITUTION AND MEETINGS OF STATE CONSUMER PROTECTION COUNCIL (Sec. 6):

1) Every State Government establishes with effect from specified date a State Consumer Protection Council for such State to be known as the State Council.

2) The State Council is an advisory council and consists of the following members, namely:—

   a) the Minister-in-charge of Consumer Affairs in the State Government who is the Chairperson;

   b) Specified number of other official or non-official members representing prescribed interests.

   c) Specified number of other official or non-official members, not exceeding ten, nominated by the Central Government.

3) The State Council meets as and when necessary but not less than two meetings is held every year.

4) The State Council meets at suitable time and place and observes prescribed procedure in regard to the transaction of its business.

F. OBJECTS OF STATE COUNCIL (Sec. 7):

The objects of every State Council is to render advice on promotion and protection of consumer rights under this Act within the State.

G. ESTABLISHMENT,CONSTITUTION AND MEETINGS OF DISTRICT CONSUMER PROTECTION COUNCIL (Sec. 8)

1) The State Government establishes for every District with effect from a specified date a District Consumer Protection Council to be known as the District Council.

2) The District Council is an advisory council and consists of the following members, namely:—

a) the Collector of the district (by whatever name called), who is the Chairperson; and

b) Suitable number of other official and non-official members representing prescribed interests.

3) The District Council meets as and when necessary but not less than two meetings is held every year.

4) The District Council meets at specified time and place within the district and observes prescribed procedure in regard to the transaction of its business.

H. OBJECTS OF DISTRICT COUNCIL (Sec. 9):

The objects of every District Council is to render advice on promotion and protection of consumer rights under this Act within the district.

UNIVERSITY QUESTIONS FOR REVIEW:

1) *Explain the constitution, meetings and objectives of Central Council, State Consumer Protection Council and District Consumer Protection Council.*

2) *What is the constitution, meetings and objectives of Central Council, State Consumer Protection Council and District Consumer Protection Council ?*

3) *Write short note on-a) Central Council, b)State Consumer Protection Council c) District Consumer Protection Council.*

17. CENTRAL CONSUMER PROTECTION AUTHORITY (Sec. 10 to 22)

SYNOPSIS:

A. *Establishment and purpose of Central Consumer Protection Authority (Sec 10)*

B. *Constitution and location of Central Consumer Protection Authority (Sec. 11)*

C. *Validity of act or proceedings of Central Consumer Protection Authority (Sec. 12)*

D. *Officers, Experts and Professionals of Central Consumer Protection Authority (Sec. 13)*

E. *Functions of Central Consumer Protection Authority (Sec 14 to 17)*

F. *Powers of Central Consumer Protection Authority (Sec 18 to 22)*

A. ESTABLISHMENT AND PURPOSE OF CENTRAL CONSUMER PROTECTION AUTHORITY: (Sec. 10)

1. The Central Government establishes a Central Consumer Protection Authority to be known as the Central Authority.

2. This Authority regulates matters relating to violation of rights of consumers, unfair trade practices and false or

misleading advertisements which are prejudicial to the interests of public and consumers.

3. Further, this Authority promotes, protects and enforces the rights of consumers as a class.

B. CONSTITUTION AND LOCATION OF CENTRAL CONSUMER PROTECTION AUTHORITY: (Sec. 11)

1. The Central Authority consists of a Chief Commissioner and prescribed number of other Commissioners to exercise the powers and discharge the functions under this Act.

2. The headquarters of the Central Authority is at specified place in the National Capital Region of Delhi, and it has regional and other offices in any other place in India.

3. The Central Government makes rules to provide for the qualifications for appointment, method of recruitment, procedure for appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of the service of the Chief Commissioner and Commissioners of the Central Authority.

C. VALIDITY OF ACT OR PROCEEDINGS OF CENTRAL CONSUMER PROTECTION AUTHORITY: (Sec. 12)

The act or proceeding of the Central Authority is valid even if there is -

a. any vacancy in the Central Authority or any defect in the constitution of the Central Authority or

b. any defect in the appointment of a person acting as the Chief Commissioner or as a Commissioner; or

c. any irregularity in the procedure of the Central Authority not affecting the merits of the case.

D. OFFICERS, EXPERTS AND PROFESSIONALS OF CENTRAL CONSUMER PROTECTION AUTHORITY: (Sec. 13)

1. The Central Government provides the Central Authority necessary number of officers and other employees for the efficient performance of its functions under the Act.

2. The salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the Central Authority appointed under this Act shall be such as prescribed.

3. The Central Authority may engage necessary number of experts and professionals of integrity and ability, who have special knowledge and experience in the areas of consumer rights and welfare, consumer policy, law, medicine, food safety, health, engineering, product safety, commerce, economics, public affairs or administration to assist it in the discharge of its functions under this Act.

E. FUNCTIONS OF CENTRAL CONSUMER PROTECTION AUTHORITY: (Sec. 14 to 17)

1. The Central Authority regulates the procedure for transaction of its business and allocation of its business amongst the Chief Commissioner and Commissioners.

2. The Chief Commissioner has the powers of general superintendence, direction and control in respect of all administrative matters of the Central Authority:

3. The Chief Commissioner may delegate his powers relating to administrative matters of the Central Authority to any Commissioner (including Commissioner of a regional office) or any other officer of the Central Authority.

4. The Central Authority has an Investigation Wing headed by a Director- General for the purpose of conducting inquiry or investigation. The Central Government may appoint a Director-General and prescribed number of Additional Director-General, Director, Joint Director, Deputy Director and Assistant Director, from amongst persons who have experience in investigation and possess prescribed qualifications,

5. Every Additional Director-General, Director, Joint Director, Deputy Director and Assistant Director exercises his powers, and discharge his functions, subject to the general control, supervision and direction of the Director-General.

6. The Director-General may delegate all or any of his powers to the Additional Director-General or Director, Joint Director or Deputy Director or Assistant Director, while conducting inquiries or investigations under this Act.

7. The inquiries or the investigations made by the Director-General are submitted to the Central Authority in specified form, manner and time.

8. The District Collector may, on a complaint or on a reference made to him by the Central Authority or the Commissioner of a regional office, inquire into or investigate complaints regarding violation of rights of consumers as a class, on matters relating to violations of consumer rights, unfair trade practices and false or misleading advertisements, within his jurisdiction and submit his report to the Central Authority or to the Commissioner of a regional office.

9. A complaint relating to violation of consumer rights or unfair trade practices or false or misleading advertisements which are prejudicial to the interests of consumers as a class, may be forwarded to any one of the authorities, namely, the District Collector or the Commissioner of regional office or the Central Authority.

F. POWERS OF CENTRAL CONSUMER PROTECTION AUTHORITY (Sec. 18 to 22):

The Central Authority shall—

1. protect, promote and enforce the rights of consumers as a class, and prevent violation of consumers rights under this Act;

2. prevent unfair trade practices and ensure that no person engages himself in unfair trade practices;

3. ensure that no false or misleading advertisement is made of any goods or services which contravenes the provisions of this Act or its rules or regulations.

4. ensure that no person takes part in the publication of any advertisement which is false or misleading.

5. The Central Authority may, for any of the purposes aforesaid,—

   a. inquire or cause an inquiry or investigation to be made into violations of consumer rights or unfair trade practices, either suo motu or on a complaint received or on the directions from the Central Government;

   b. file complaints before the District Commission, the State Commission or the National Commission.

   c. intervene in any proceedings before the District Commission or the State Commission or the National Commission, in respect of any allegation of violation of consumer rights or unfair trade practices;

   d. review the matters relating to, and the factors inhibiting enjoyment of, consumer rights, including safeguards provided for the protection of consumers under any other law and recommend appropriate remedial measures for their effective implementation;

e. recommend adoption of international covenants and best international practices on consumer rights to ensure effective enforcement of consumer rights;

f. undertake and promote research in the field of consumer rights;

g. spread and promote awareness on consumer rights;

h. encourage non-Governmental organisations and other institutions working in the field of consumer rights to co-operate and work with consumer protection agencies;

i. mandate the use of unique and universal goods identifiers in necessary goods to prevent unfair trade practices and to protect consumers' interest;

j. issue safety notices to alert consumers against dangerous or hazardous or unsafe goods or services;

k. advise the Ministries and Departments of the Central and State Governments on consumer welfare measures;

l. issue necessary guidelines to prevent unfair trade practices and protect consumers' interest.

6. The Central Authority may, after receiving any information or complaint or directions from the Central Government or of its own motion, conduct or cause to

be conducted a preliminary inquiry as to whether there exists a prima facie case of violation of consumer rights or any unfair trade practice or any false or misleading advertisement, by any person, which is prejudicial to the public interest or to the interests of consumers and if it is satisfied that there exists a prima facie case, it causes investigation to be made by the Director-General or by the District Collector.

7. After preliminary inquiry, if the Central Authority is of the opinion that the matter is to be dealt with by a Regulator established under any other law, it may refer such matter to the concerned Regulator along with its report.

8. For the purposes of investigation, the Central Authority, Director General or the District Collector may call upon a person referred to in sub-section (1) and also direct him to produce any document or record in his possession.

9. If the Central Authority is satisfied on the basis of investigation that there is sufficient evidence to show violation of consumer rights or unfair trade practice by a person, it may pass necessary order including—

   a. recalling of goods or withdrawal of services which are dangerous, hazardous or unsafe;

   b. reimbursement of the prices of goods or services so recalled to purchasers of such goods or services; and

c. discontinuation of practices which are unfair and prejudicial to consumers' interest:

However, the Central Authority gives the person an opportunity of being heard before passing an order under this section.

10. If the Central Authority is satisfied after investigation that any advertisement is false or misleading and is prejudicial to the interest of any consumer or is in contravention of consumer rights, it may issue directions to the concerned trader or manufacturer or endorser or advertiser or publisher to discontinue such advertisement or to modify the same in specified manner and time.

11. If the Central Authority is of the opinion that it is necessary to impose a penalty in respect of such false or misleading advertisement, by a manufacturer or an endorser, it may impose on manufacturer or endorser a penalty which may extend to ten lakh rupees:

However, the Central Authority may, for every subsequent contravention by a manufacturer or endorser, impose a penalty, which may extend to fifty lakh rupees.

12. The Central Authority may prohibit the endorser of a false or misleading advertisement from making endorsement of any product or service upto one year:

However, the Central Authority may, for every subsequent contravention, prohibit such endorser from making endorsement in respect of any product or service upto three years.

13. If the Central Authority is satisfied after investigation that any person is found to publish, or is a party to the publication of, a misleading advertisement, it may impose on such person a penalty upto ten lakh rupees.

14. No endorser is liable to a penalty, if he has exercised due diligence to verify the veracity of the claims made in the advertisement regarding the product or service being endorsed by him.

15. No person is liable to such penalty if he proves that he had published or arranged for the publication of such advertisement in the ordinary course of his business:

However, no such defence is available to such person if he had previous knowledge of the order passed by the Central Authority for withdrawal or modification of such advertisement.

16. While determining the penalty, regard shall be had to the following, namely:—

a. the population and the area impacted or affected by such offence;

b. the frequency and duration of such offence;

c. the vulnerability of the class of persons likely to be adversely affected by such offence; and

d. the gross revenue from the sales effected by virtue of such offence.

17. The Central Authority gives the person an opportunity of being heard before an order is passed.

18. For the purpose of conducting an investigation after preliminary inquiry, the Director-General or any other officer authorised by him in this behalf, or the District Collector may, if he has any reason to believe that any person has violated any consumer rights or committed unfair trade practice or causes any false or misleading advertisement to be made, shall,—

a. Enter at any reasonable time into any such premises and search for any document or record or article or any other form of evidence and seize such document, record, article or such evidence;

b. Make a note or an inventory of such record or article; or

c. Require any person to produce any record, register or other document or article.

19. The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure apply for search and seizure.

20. Every document, record or article seized or produced is returned to the person, from whom they were seized or who produced the same, within a period of twenty days of the date of such seizure or production, after copies thereof or extracts therefrom certified by that person, in prescribed manner have been taken.

21. If any article seized is subject to speedy or natural decay, the Director-General or such other officer may dispose of the article in prescribed manner.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the constitution, functions and powers of the Central Consumer Protection Authority.*
2. *The establishment of Central Consumer Protection Authority is to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers - Discuss.*
3. *Write short note on- a) Central Consumer Protection Authority b) Powers and functions of Central Consumer Protection Authority.*

18. DISTRICT CONSUMER DISPUTES REDRESSAL FORUM (DISTRICT COMMISSION) (Sec. 28 to 41)

SYNOPSIS:

A. *Establishment of District Consumer Disputes Redressal Commissions (Sec.28)*
B. *Constitution of District Commission*
C. *Vacancy in office of member of District Commission (Sec. 32)*
D. *Officers and other employees of District Commission (Sec. 33)*
E. *Jurisdiction of District Commission (Sec. 34)*
F. *Manner of complaint (Sec. 35)*
G. *Proceedings before District Commission (Sec. 36)*
H. *Reference to mediation (Sec. 37)*
I. *Procedure on admission of complaint (Sec. 38)*
J. *Findings of District Commission (Sec. 39)*
k. *Review by District Commission in certain cases (Sec. 40)*
l. *Appeal against order of District Commission (Sec. 41)*

A seller/service provider while selling/ providing service, may commit 'defect in goods' and deficiency in service respectively. In such cases, the affected consumer

can approach the nearby District Consumer Forum and file a complaint to seek remedy.The details like the constitution, officers heading the consumer forum, its jurisdiction, powers and functions are as given below.

A. ESTABLISHMENT OF DISTRICT CONSUMER DISPUTES REDRESSAL COMMISSION (Sec.28):

The State Government establishes a District Consumer Disputes Redressal Commission, to be known as the District Commission, in each district of the State:

The State Government may also establish more than one District Commission in a district.

B. CONSTITUTION OF DISTRICT COMMISSION:

1) Each District Commission consists of— (a) a President; and

b) not less than two and not more than prescribed number of members.

2) The Central Government makes rules to provide for the qualifications, method of recruitment, procedure for appointment, term of office, resignation and removal of the President and members of the District Commission.(Sec 29)

3) The State Government also makes rules to provide for salaries and allowances and other terms and conditions of service of the President, and members of the District Commission.(Sec. 30)

C. VACANCY IN OFFICE OF MEMBER OF DISTRICT COMMISSION (Sec. 32):

If there is a vacancy in the office of the President or member of a District Commission, the State Government directs—

a) any other District Commission to exercise the jurisdiction in respect of that district also; or

b) the President or a member of any other District Commission specified to exercise the powers and the functions of the President or member of that District Commission also.

D. OFFICERS AND OTHER EMPLOYEES OF DISTRICT COMMISSION (Sec. 33):

1) The State Government provides the District Commission with required officers and other employees to assist the District Commission in the discharge of its functions.

2) The officers and other employees of the District Commission discharge their functions under the general superintendence of the President of the District Commission.

3) The salaries and allowances payable and the other terms and conditions of service of the officers and other employees of the District Commission are as prescribed.

E. JURISDICTION OF DISTRICT COMMISSION (Sec. 34):

1) The District Commission has jurisdiction to entertain complaints where the value of the goods or services paid as consideration does not exceed ONE CRORE rupees. However, the Central Government, If necessary, may prescribe other value, it deems fit.

Gian Prakash Vs. M.T.N.L. & anr. 1993 :

It was decided that the valuation of the relief should not be grossly inflated (increased) in order to file the suit in the State Commission.

In this case, the complainant grossly inflated the claim to institute the case in the State Commission. Held that the petition should be returned for the complainant to present it before the District forum.

2) A complaint is instituted in a District Commission within the local limits of whose jurisdiction,—

a) the opposite party or each of the opposite parties, at the time of the institution of the complaint, **ordinarily resides or carries on business or has a branch office or personally works for gain;** or

b) any of the opposite parties, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain.

In such cases, the permission of the District Commission is necessary. (or)

(c) the cause of action, wholly or in part, arises (or)

Mrs. Aruna Singhal Vs. Texla Television Jupiter Radio (1991):

In this case, it was decided that though the manufacturer was outside the jurisdiction of the district forum, the cause of action namely the purchase of the TV, issue of the cash memo and payment of price took place at Jaipur, and hence the District forum at Jaipur could hear the case.

Filing of the complaint in the wrong forum gives rise to return of the complaint for presentation before a competent redressal forum. The question as to right jurisdiction can be decided by the District forum only and it cannot be challenged by writ under Article 226.

Also, the parties cannot confer jurisdiction by agreement if the Court has no jurisdiction to try the suit and hence such agreement between the parties conferring exclusive jurisdiction is not valid.

Consumer Education and Research Society Vs. Skypak Couriers P. Ltd (1991):

In this case, the parties have entered into agreement to refer their dispute to Bombay Forum, whereas, the cause of action arose both in Delhi and Ahmedabad.

The suit related to a parcel dispatched from Delhi to be delivered at Ahmedabad.

Forum either at Delhi or Ahmedabad could entertain the case and not Bombay forum as agreed by the parties. In cases where there are more Courts than one to try a case, the parties can mutually agree to refer the dispute to one of these Courts.

But even in such cases, though the stipulation to restrict a dispute to a particular Court is valid, it cannot take away the jurisdiction of the Court which admittedly has jurisdiction. It cannot operate to defeat the ends of justice.

d) the complainant resides or personally works for gain.

3) The District Commission ordinarily functions in the district headquarters. It performs its functions at other place in the district, after the State Government notifies in consultation with the State Commission.

F. MANNER OF COMPLAINT (Sec. 35):

1) A complaint, in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided, is filed with a District Commission by—

a) the consumer,—

i) to whom such goods are sold or delivered or agreed to be sold or delivered or such service is provided or agreed to be provided;

Life Insurance Corporation of India Bombay Vs. Chatur Behari Lal:

Failure to make payment by the Insurance Company to the nominee gives rise to a cause of action and the nominee can make a complaint in the District forum.

In some cases, the consumer may not be in a position to make a complaint, like in cases where the consumer is injured or dies due to the negligence or deficiency of service of the opposite party.

The legal representative can make a complaint on behalf of the deceased consumer. In the same manner, a duly authorised agent may make a complaint on behalf of the principal.

The authority to act need not be in writing and it may be an implied authority. Eg., a husband may act on behalf of the wife who is deceased.

Insurance Corporation of India Bombay Vs. Chatur Behari Lal:

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In some cases, the consumer may not be in a position to make a complaint, like in cases where the consumer is injured or dies due to the negligence or deficiency of service of the opposite party.

The legal representative can make a complaint on behalf of the deceased consumer. In the same manner, a duly authorised agent may make a complaint on behalf of the principal. The authority to act need not be in writing and it may be an implied authority. Eg., a husband may act on behalf of the wife who is deceased.

(ii) who alleges unfair trade practice in respect of such goods or service;

b) any recognised consumer association, whether the affected consumer is a member or not.

c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Commission, on behalf of, or for the benefit of, all consumers so interested; or

d) the Central Government, the Central Authority or the State Government. However, the complaint under this sub-section may be filed electronically in the prescribed manner.

2) Every complaint filed should be accompanied with prescribed fee and payable in prescribed manner, including electronic form. (Section 35)

G. PROCEEDINGS BEFORE DISTRICT COMMISSION (Sec. 36)

1) Every proceeding before the District Commission is conducted by the President of that Commission and atleast one member thereof, sitting together.

If a member, for any reason, is unable to conduct a proceeding till it is completed, the President and the other member continue the proceeding from the stage at which it was last heard by the previous member.

2) On receipt of a complaint, the District Commission may admit the complaint for being proceeded with or reject the same:

A complaint should not be rejected without giving an opportunity of being heard to the complainant.The admissibility of the complaint is ordinarily be decided within twenty-one days from the date on which the complaint was filed.

3) If the District Commission does not decide the issue of admissibility of the complaint within the specified period, it is deemed to have been admitted.

H. REFERENCE TO MEDIATION (Sec. 37):

1) At the first hearing of the complaint after its admission, or at any later stage, if it appears to the District Commission that there exists elements of a settlement which may be acceptable to the parties, except in prescribed cases, it may direct the parties to give in writing, within five days, consent to have their dispute settled by mediation.

2) If the parties agree for settlement by mediation and give their consent in writing, the District Commission,

within five days of receipt of such consent, refers the matter for mediation, and in such case, the provisions relating to mediation apply.

I. PROCEDURE ON ADMISSION OF COMPLAINT (Sec. 38):

1) The District Commission, on admission of a complaint, or in cases referred for mediation on failure of settlement by mediation, proceed with such complaint.

2) If the complaint relates to any goods, the District Commission -

a) Refers a copy of the admitted complaint, within twenty-one days from the date of its admission to the opposite party directing him to give his version of the case within thirty days or such extended period not exceeding fifteen days.

Smt. Veena Gupta Vs. Satyam Builders (1992):

In this case, the respondent's house premises was locked and hence, it was ordered that the notice be pasted at the respondent's premises. Refusal of respondent to receive the notice gives the forum chance to proceed exparte.

b) If the opposite party on receipt of a complaint denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Commission, proceed to settle the consumer dispute.

c) If the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, obtains a sample of the goods from the complainant, seals it and authenticate it in the prescribed manner and refers the sample so sealed to the appropriate laboratory along with a direction that such laboratory to make an analysis or test, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District Commission within forty-five days of the receipt of the reference or within such extended period.

d) Before any sample of the goods is referred to any appropriate laboratory, requires the complainant to deposit to the credit of the Commission specified fees for payment to the appropriate laboratory for carrying out the necessary analysis or test.

e) Remits the amount deposited to its credit to the appropriate laboratory to enable it to carry out the analysis or test and on receipt of the report from the appropriate laboratory, it forwards a copy of the report along with appropriate remarks to the opposite party.

f) If any of the parties disputes the correctness of the findings of the appropriate laboratory, or disputes the correctness of the methods of analysis or test adopted by the appropriate laboratory, requires the opposite party or the complainant to submit in writing his objections

with regard to the report made by the appropriate laboratory;

g) Gives a reasonable opportunity to the complainant as well as the opposite party of being heard as to the correctness or otherwise of the report made by the appropriate laboratory and also as to the objection made and issues an appropriate order.

Chemics Electronics Vs. Ramesh Chandra K. Bulsara (1992):

In this case, there was a doubt whether the defect in the TV was a manufacturing defect or any other kind of defect. In the interests of justice, it was held that giving fair opportunity for both sides require giving the TV set to a Testing laboratory for examining by an expert.

Navrang Electronics Vs. M.K. Joy (1991):

The TV set had undergone repairs two times within two months of its purchase which itself proved that there was a manufacturing defect.There is no need for elaborate expensive laboratory tests and complicated processes when the defect is revealed by naked eyes.

The Manager Seemathi Vs. K.V. Roy (1992):

The complainant had purchased two new Kota sarees with attached blouse pieces. When the blouse pieces were washed, the entire print disappeared.

The complainant produced the blouse pieces in the District forum which decided that there was gross defect in the goods which does not need elaborate laboratory tests.

The decision of the District forum shall be based on the evidence produced by the parties and not merely on the basis of pleadings.

Patel Arvindbhai Umeddas Vs. Dy. Engineer, Gujarat Electricity Board (1993)]]

The burden of proof of a complaint lies on the complainant to prove the defect in the goods as averred in his complaint.

3) If the complaint admitted by it relates to goods, in respect of which the appropriate procedure cannot be followed, or if the complaint relates to any services, the District Commission—

a) Refers a copy of such complaint to the opposite party directing him to give his version of the case within thirty days or such extended period not exceeding fifteen days.

b) If the opposite party, on receipt of a copy of the complaint, denies or disputes the allegations or omits or fails to take any action to represent his case within the time given by the District Commission, it proceeds to settle the consumer dispute—

(i) on the basis of evidence brought to its notice by the complainant and the opposite party, if the opposite party denies or disputes the allegations contained in the complaint,

Manager, Ashok Pipe Udhyog Vs. Salook Ram:

a) The opposite party must be given reasonable opportunity to file written statements.

b) Opportunity to present the case must be given and any judgement given by the forum in violation of this principle is a fatal flaw

c) Opportunity to produce evidence must be given to the appellant at the appellate stage.

d) Reasonable opportunity must be given to the complainant to be heard and advance arguments on merits.

e) Fair opportunity to adduce evidence must be given to both the parties.

(ii) *Ex parte* on the basis of evidence brought to its notice by the complainant, if the opposite party fails to take any action to represent his case within the time given by the Commission;

The proceedings taken by the District forum in respect of the complaint cannot be held as violative of the principles of natural justice. But, in the

procedure adopted by the Consumer forum, the principles of natural justice must be followed.

Santosh Kumar Bhattacharjee Vs. The President Calcutta District Forum (1992):

In this case, the District forum passed the order exparte without giving the petitioners any opportunity of giving their version of the case. Hence, it was not sustainable on the ground of violation of principles of natural justice.

c) Decides the complaint on merits if the complainant fails to appear on the date of hearing.

4) For the above purposes,the District Commission may require an electronic service provider to provide specified information, documents or records.

5) Any proceedings complying with the above procedure cannot be called in question in any court on the ground that the principles of natural justice have not been complied with.

6) Every complaint is heard by the District Commission on the basis of affidavit and documentary evidence placed on record:

However, if an application is made for hearing or for examination of parties in person or through video conferencing, the District Commission may, on

sufficient cause being shown, and after recording its reasons in writing, allows the same.

7) Every complaint is disposed of as expeditiously as possible and endeavour should be made to decide the complaint within three months from the date of receipt of notice by opposite party, if the complaint does not require analysis or testing of commodities and within five months, if it requires analysis or testing of commodities:

However, adjournment is ordinarily granted by the District Commission, only if sufficient cause is shown and the reasons for grant of adjournment are recorded in writing by the Commission:

Further, the District Commission makes specified orders as to the costs occasioned by the adjournment. However, in the event of a complaint being disposed of after the period so specified, the District Commission should record in writing the reasons for the same at the time of disposing of the said complaint.

If there is difference of opinion on any point/points conducted by the President and one member, such disputed point/points are referred to the other members and the opinion of the majority shall be the order of the forum.

The procedure relating to the conduct of the meetings of the District forum and other matters are prescribed by the State Government.

8) If during the pendency of any proceeding before the District Commission, if it appears necessary, it may pass just and proper interim order.

9) The District Commission has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:—

a) The summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;

b) Requiring the discovery and production of any document or other material object as evidence;

c) Receiving of evidence on affidavits;

d) The requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

e) Issuing of commissions for the examination of any witness, or document; and

f) Any other prescribed matter by the Central Government.

In Re State Transport Authority & Another:

It was held that though the Consumer Tribunal (forum) had the same powers as a Civil Court, they were limited. They do not have power to grant and /or pass any ad-

interim order, or enjoy the inherent powers as embodied in the Code of Civil Procedure. There is no provision for setting aside an exparte order.

K.M. Singh Vs. Sir Ganga Ram Hospital:

In this case, the written statement filed was not signed by the trustee or other authorised person and hence the appellant contended that it should be rejected. The forum held that the technical provisions of the Code of Civil Procedure are not applicable to the proceedings before the Consumer Forums/Commissions.

Complex proceedings involving questions of fact and law arising for determination requiring elaborate pleadings and documents to be filed, cannot be heard summarily in the consumer forums.

M/S Special Machines Karnal Vs. Punjab National Bank & Others.:

In this case, it was averred that though the Consumer forums are vested with powers of a Civil Curt the Act does not contemplate determination of complicated issues of fact involving taking of elaborateoral evidence and adducing of voluminous documentary evidence, scrutiny and assessment of such evidence, etc.

The Act deals with only simple issues like defect in quality of goods or inadequacy in the performance of services.

If such cases require elaborate oral and documentary evidence the Consumer forum shall decline jurisdiction and refer the case to be tried by ordinary Civil Court.

10) Every proceeding before the District Commission is deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code, and the District Commission is deemed to be a criminal court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

11) If the complainant is a consumer, the provisions of Order I Rule 8 of the First Schedule to the Code of Civil Procedure, 1908 shall apply subject to the modification that every reference therein to a suit or decree is construed as a reference to a complaint or the order of the District Commission thereon.

12) In the event of death of a complainant who is a consumer or of the opposite party, the provisions of Order XXII of the First Schedule to the Code of Civil Procedure, 1908 apply subject to the modification that every reference therein to the plaintiff and the defendant is construed as reference to a complainant or the opposite party.

J. FINDINGS OF DISTRICT COMMISSION (Sec. 39):

1) If the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services or any unfair trade practices, or claims for

compensation under product liability are proved, the District Commission issues an order to the opposite party directing him to do one or more of the following, namely:—

a) To remove the defect pointed out by the appropriate laboratory from the goods in question;

Sh. Sudhir Saran Bhatnagar Vs. Chairman, Competent Automobile Co. (P) Ltd:

In this case, there were two defects in the car during warranty period itself. The forum ordered that the car should be repaired free of charge and if any part required to be replaced, it should be done free of cost.

The warranty period for these two defects shall come to an end if the car remains free of these defects for a continuous period of three months.

b) To replace the goods with new goods of similar description which is free from any defect;

B. Ratnakar Rao Vs. Automotive Manufacturers Ltd.,

The trader sold a defective accident suffered car to the complainant as a new one (unfair tradepractice).

The forum directed the opposite party to replace the defective car with a new one of the same description without any defect, or return the amount of Rs. 1,32,182/- and other charges of the vehicle within eight weeks from the date of the order.

c) To return to the complainant the price, the charges paid by the complainant along with such interest on such price or charges.

Mathew M. Puliyel Vs. M/S Indian Gas Cylinders:

The consumer suffered due to a defect in the washing machine he purchased. Though the trader agreed to repair the machine free of charges, he could not succeed in getting it repaired up to the satisfaction of the consumer. The forum ordered for the refund of the price of the machine.

d) To pay such amount awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party:

The District Commission has the power to grant punitive damages in fit circumstances.

e) To pay the amount awarded by it as compensation in a product liability action.

f) To remove the defects in goods or deficiencies in the services.

The Asst. Engineer A.P.E.B. Vs. Gunda Hanumantha Rao:

There was wrongful disconnection of electricity which the Commission ordered to be continued and pay compensation and costs of the respondent.

g) To discontinue the unfair trade practice or restrictive trade practice and not to repeat them;

h) Not to offer the hazardous or unsafe goods for sale;

i) To withdraw the hazardous goods from being offered for sale;

j) To cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;

k) To pay the sum determined by it, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:

The minimum amount of sum so payable should not be less than twenty-five per cent of the value of such defective goods sold or service provided to such consumers;

l) To issue corrective advertisement to neutralise the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;

m) To provide for adequate costs to parties; and

Mumbai Grahak Panchayat Vs. M/S Hero Honda Motors Ltd:

The Consumer association had spent much money towards collecting and cataloguing the details and

expenses made by it, and hence the costs of the complaint was ordered to be paid by the opposite party.

n) To cease and desist from issuing any misleading advertisement.

Consumer Education and Research Society Vs. Godrej Soaps Ltd (1991):

The advertisement of the hair dye had used the words "totally safe" which was held to be misleading. Even if all the requirements of law has been complied with, sometimes, the dye may be allergic to some individuals and also injurious to the eyes. So, an innocent purchaser may be misled by the words in the advertisement.

The Consumer forum ordered that the Godrej Company should delete the words "totally safe" from the advertisements published by them in future.

2) Any amount obtained under sub-section (1) is credited to prescribed fund and utilised in prescribed manner.

3) In any proceeding conducted by the President and a member and if they differ on any point or points, they should state the point or points on which they differ and refer the same to another member for hearing on such point or points and the opinion of the majority is the order of the District Commission:

The other member should give his opinion on such point or points referred to him within one month from the date of such reference.

4) Every order made by the District Commission is signed by the President and the member who conducted the proceeding:

If the order is made as per majority opinion, then such order is also signed by the other member.The Proceeding shall be conducted by the President of the District forum and at least one sitting member, and the order shall be signed by the President and the member or members.

It is not necessary that all the members should participate in the hearing of a case. But the presence of the President is essential. The order must be signed by the member who has heard the case.

Savitha Kiran Rana Vs. Bank of India:

The National Consumer Commission held that though the Consumer forum exercises summary proceedings, the orders should not be made hasty without assigning reasons in it. Proper weight should be given to the pleadings and the evidence of the parties.

Ram Singh Vs. Dy. Director National Insurance Co.:

The arguments were heard by the President alone, but the order was passed by the President and one member. This is in violation of the basic principle that he who hears the case must decide it. The order was held to be invalid.

The New India Insurance Co. Ltd. Vs. Narain Bhati:

Two members heard the arguments in the complaint, but the order was passed by the President who did not participate in the hearing. The order was set aside by the National Commission on the ground of illegality.

K. REVIEW BY DISTRICT COMMISSION IN CERTAIN CASES (Sec. 40):

The District Commission has the power to review any of the order passed by it, if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within thirty days of such order.

L. APPEAL AGAINST ORDER OF DISTRICT COMMISSION (Sec. 41):

Any person aggrieved by an order made by the District Commission may prefer an appeal against such order to the State Commission on the grounds of facts or law within forty-five days from the date of the order, in prescribed form and manner.

The State Commission may entertain an appeal after the expiry of the said period of forty-five days, if it is satisfied that there was sufficient cause for not filing it within that period:

An appeal by a person is entertained by the State Commission, only if the appellant has deposited fifty per

cent of that amount. No appeal lies from any order passed by the District Commission pursuant to a settlement by mediation.

UNIVERSITY QUESTIONS FOR REVIEW:

1) *Explain the constitution, procedure of filing a complaint and deciding the complaint in a District Commission.*

2) *Mediation has become mandatory before deciding a complaint by a District Commission - Discuss.*

3) *Write short note on- a) District Commission. b) Procedure of filing a complaint. c) Appeal against order of District Commission d) Findings of District Commission.*

19. STATE COMMISSION (STATE CONSUMER DISPUTES REDRESSAL COMMISSION) (Sec. 42 to 52)

SYNOPSIS:

A. *Establishment of State Consumer Disputes Redressal Commission (Sec. 42)*
B. *Qualification etc., of the President and members of the State Commission (Sec. 43)*
C. *Salaries, etc.,of the President and members of the State Commission (Sec. 44):*
D. *Officers and employees assisting the State Commission (Sec. 46)*
E. *Jurisdiction of State Commission (Sec. 47)*
F. *Transfer of a complaint (Sec. 48)*
G. *Disposal of Complaints (Sec. 49)*
H. *Power of Review (Sec. 50)*
I. *Appeal (Sec. 51)*
J. *Expeditious hearing of Appeal (Sec. 52)*

A seller/ service provider while selling/ providing service, may commit 'defect in goods' and deficiency in service respectively. In such cases, the affected consumer can approach the nearby District Consumer Forum and file a complaint to seek remedy.

As against the order and judgement of the District Consumer Forum, the complainant or the respondent (opposite party) may prefer an appeal to the State Consumer Commission. In addition, the State Commission has original jurisdiction if the monetary value of the complaint exceeds Rs 1 crore and up to Rs 10 crores.

The details like the constitution, officers heading the State consumer commission, its original and appellate jurisdiction, powers and functions are as given below.

A. ESTABLISHMENT OF STATE CONSUMER DISPUTES REDRESSAL COMMISSION (Sec. 42):

1) The State Government establishes a State Consumer Disputes Redressal Commission, to be known as the State Commission, in the State.

2) The State Commission ordinarily functions at the State capital and performs its functions at other notified places also.

The State Government may also establish regional benches of the State Commission, at fit places.

3) Each State Commission consists of—

a) a President; and

b) not less than four or not more than prescribed number of members in consultation with the Central Government.

B. QUALIFICATION ETC., OF PRESIDENT AND MEMBERS OF STATE COMMISSION (Sec. 43)

The Central Government makes rules to provide for the qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the State Commission.

C. SALARIES, ETC.,OF PRESIDENT AND MEMBERS OF STATE COMMISSION (Sec. 44):

1) The State Government may make rules to provide for salaries and allowances and other terms and conditions of service of the President and members of the State Commission.

2) Any person appointed as President or, a member of the State Commission immediately before the commencement of this Act holds office as President or member till the completion of his term.(Sec. 45)

D. OFFICERS AND EMPLOYEES ASSISTING STATE COMMISSION (Sec. 46):

1) The State Government determines the nature and categories of the officers and other employees required to assist the State Commission in the discharge of its functions and provide the Commission with necessary number of officers and other employees.

2) The officers and other employees of the State Commission discharge their functions under the general superintendence of the President.

3) The salaries and allowances payable to and the other terms and conditions of service of the officers and other employees of the State Commission are such as prescribed.

E. JURISDICTION OF STATE COMMISSION (Sec. 47):

1) The State Commission has jurisdiction—

a) to entertain—

i) complaints where the value of the goods or services paid as consideration, exceeds rupees one crore, but does not exceed rupees ten crore:

If the Central Government deems it necessary so to do, it may prescribe other value also.

Rita Arora Vs. Gurmeet Singh:

The complainant highly inflated a claim to Rs. 3,50,000/-in a transaction of Rs. 329.95 only. The loss suffered as alleged by him was vague, as he did not produce the medical bills, and could not give the exact damage suffered by him.

The claim being highly inflated, the State Commission refused to entertain the claim and advised it be filed in the District forum by claiming reasonable amount. The State Commission held that it shall not entertain claims which are inflated.

ii) Complaints against unfair contracts, if the value of goods or services paid as consideration does not exceed ten crore rupees;

iii) Appeals against the orders of any District Commission within the State; and

b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Commission within the State, if it appears to the State Commission that such District Commission has

-exercised a jurisdiction not vested in it by law, or

-has failed to exercise a jurisdiction so vested or

-has acted in exercise of its jurisdiction illegally or with material irregularity.

2) The jurisdiction, powers and authority of the State Commission may be exercised by its Benches and a Bench may be constituted by the President with one or more members. However, the senior-most member presides over the Bench.

3) If the members of a Bench differ in opinion on any point, the points are decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they should state the point or points on which they differ, and make a reference to the

President who either hears the point or points himself or refers the case for hearing on such point or points by one or more of the other members and such point or points are decided according to the opinion of the majority of the members who have heard the case, including those who first heard it:

The President or the other members give opinion on the point or points so referred within one month from the date of such reference.

4) A complaint is instituted in a State Commission within the limits of whose jurisdiction,—

a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, ordinarily resides or carries on business or has a branch office or personally works for gain; or

b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided in such case, the permission of the State Commission is given; or

c) the cause of action, wholly or in part, arises; or

R. Sathyanarayan Vs. The Registrar, Supreme Court of India:

Certified copy required by the complainant was not supplied by the Registrar of the Supreme Court. The complainant filed the complaint in the State Commission, Karnataka.

It was held that the State Commission has no territorial jurisdiction over the Supreme Court which is at Delhi and the compensation amount claimed was Rs. 10,000/- only, which was not the pecuniary jurisdiction of the State Commission.

d) the complainant resides or personally works for gain.

F. TRANSFER OF A COMPLAINT (Sec. 48):

On the application of the complainant or of its own motion, the State Commission may, at any stage of the proceeding, transfer any complaint pending before a District Commission to another District Commission within the State in the interest of justice.

G. DISPOSAL OF COMPLAINTS (Sec. 49):

1) The provisions relating to complaints under sections 35, 36, 37, 38 and 39, with necessary modifications are applicable to the disposal of complaints by the State Commission.

2) The State Commission may also declare any terms of contract, which is unfair to any consumer, to be null and void.

H. POWER OF REVIEW (Sec. 50):

The State Commission has the power to review any of the order passed by it, if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within thirty days of such order.

I. APPEAL (Sec. 51)

1) Any person aggrieved by an order made by the State Commission may prefer an appeal against such order to the National Commission within thirty days from the date of the order in prescribed form and manner.

2) The National Commission entertains the appeal after the expiry of the said thirty days, only if it is satisfied that there was sufficient cause for not filing it within that period.

3) Any appeal by a person is entertained by the National Commission, only if the appellant has deposited fifty per cent of the award amount in the prescribed manner.

4) An appeal lies to the National Commission from any order passed in appeal by any State Commission, if the National Commission is satisfied that the case involves a substantial question of law.

5) In an appeal involving a question of law, the memorandum of appeal should precisely state the substantial question of law involved in the appeal.

6) If the National Commission is satisfied that a substantial question of law is involved in any case, it formulated that question and hear the appeal on that question:

The National Commission has power to hear, for reasons to be recorded in writing, the appeal on any other substantial question of law, if it is satisfied that the case involves such other question of law.

7) An appeal may lie to the National Commission from an order passed ex parte by the State Commission.

M/S New India Assurance Co. Ltd. Vs. Indrakumar Nainmal Parmar:

In this case, the appellant exceeded the time limit for appeal for reasons like insufficiency of funds and wrong advice of the Advocate.

The National Commission held that there is no Court fee for the appeal, and not much funds are required for appeal. Further, there is no Affidavit to show that the Advocate had given any such advice. The delay was not excused and the limitation was not extended.

J. EXPEDITIOUS HEARING OF APPEAL (Sec. 52):

An appeal filed before the State Commission or the National Commission, is heard expeditiously and every endeavour should be made to dispose of the appeal within ninety days from the date of its admission.

No adjournment is ordinarily granted by the State Commission or the National Commission, unless sufficient cause is shown and the reasons for grant of adjournment have been recorded in writing by such Commission.

The State Commission or the National Commission, makes such orders as to the costs occasioned by the adjournment, as specified by regulations.

In the event of an appeal being disposed of after the period so specified, the State Commission or the National Commission should record in writing the reasons for the same at the time of disposing of the said appeal.

UNIVERSITY QUESTIONS FOR REVIEW:

1) *Explain the constitution and procedure of hearing by State Commission.*

2) *What are the powers and functions of State Commission?*

3) *Write short note on- State Commission.*

20. NATIONAL COMMISSION (NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION) [Sec. 53 to 73]

SYNOPSIS:

A. *Establishment of National Consumer Disputes Redressal Commission(Sec. 53)*

B. *Composition of National Commission(Sec. 54)*

C. *Qualifications, etc., of President and members of National Commission(Sec. 55)*

D. *Transitional provision(Sec. 56)*

E. *Other officers and employees of National Commission(Sec. 57)*

F. *Jurisdiction of National Commission(Sec. 58)*

G. *Procedure applicable to National Commission(Sec. 59)*

H. *Review by National Commission in certain cases (Sec. 60)*

I. *Power to set aside ex parte orders(Sec. 61)*

J. *Transfer of cases(Sec. 62)*

K. *Vacancy in office of President of National Commission(Sec. 63)*

L. *Vacancies or defects in appointment not to invalidate orders(Sec. 64)*

M. *Service of notice, etc.(Sec. 65)*

N. *Experts to assist National Commission or State Commission (Sec. 66)*

O. *Appeal against the order of National Commission (Sec. 67)*

P. *Finality of orders (Sec. 68)*

Q. *Limitation period(Sec. 69)*

R. *Administrative control(Sec. 70)*

S. *Enforcement of orders of District Commission, State Commission and National Commission (Sec. 71)*

T. *Penalty for noncompliance of order(Sec. 72)*

U. *Appeal against order passed under section 72 (Sec. 74)*

A seller/service provider while selling/ providing service, may commit 'defect in goods' and deficiency in service respectively. In such cases, the affected consumer can approach the nearby District Consumer Forum and file a complaint to seek remedy.

As against the order and judgement of the District Consumer Forum, the complainant or the respondent (opposite party) may prefer an appeal to the State Consumer Commission. As against the order and judgement of the State Commission, the appellant or the respondent may prefer an appeal to the National Consumer Commission.

In addition, the National Commision has original jurisdiction if thee monetary value of the complaint is above Rs10 crores. The details like the constitution, officers heading the National consumer commission, its original and appellate jurisdiction, powers and functions are as given below.

A. ESTABLISHMENT OF NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION (Sec. 53):

1) The Central Government establishes a National Consumer Disputes Redressal Commission, to be known as the National Commission.

(2) The National Commission ordinarily functions at the National Capital Region and performs its functions at such other places as the Central Government may in consultation with the National Commission notify.

The Central Government may establish regional Benches of the National Commission at other necessary places.

B. COMPOSITION OF NATIONAL COMMISSION (Sec. 54)

The National Commission consists of—

a) A President; and

b) Not less than four and not more than prescribed number of members.

C. QUALIFICATIONS, ETC., OF PRESIDENT AND MEMBERS OF NATIONAL COMMISSION (Sec. 55)

1) The Central Government may make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the President and members of the National Commission.

The President and members of the National Commission hold office for specified term, but not exceeding five years from the date on which he enters upon his office and are eligible for re-appointment:

No President or members hold office as such after he has attained such age as specified in the rules made by the Central Government which shall not exceed,—

a) In the case of the President, the age of seventy years;

b) In the case of any other member, the age of sixty-seven years.

2) The salary and allowances nor the other terms and conditions of service of President and members of the National Commission are varied to his disadvantage after his appointment.

D. TRANSITIONAL PROVISION (Sec. 56)

The President and every other member appointed immediately before the commencement of section 177 of

the Finance Act, 2017 shall continue to be governed by the provisions of the Consumer Protection Act, 1986 and the rules made thereunder as if this Act had not come into force.

E. OTHER OFFICERS AND EMPLOYEES OF NATIONAL COMMISSION (Sec. 57)

1) The Central Government provides, in consultation with the President of the National Commission, required number of officers and other employees to assist the National Commission in the discharge of its functions.

2) The officers and other employees of the National Commission discharge their functions under the general superintendence of the President of the National Commission.

3) The salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the National Commission are such as prescribed.

F. JURISDICTION OF NATIONAL COMMISSION (Sec. 58):

1) The National Commission has jurisdiction—

a) to entertain—

i) complaints where the value of the goods or services paid as consideration **exceeds rupees ten crore.**

If the Central Government deems it necessary so to do, it may prescribe such other value.

ii) complaints against unfair contracts, where the value of goods or services paid as consideration exceeds ten crore rupees;

iii) appeals against the orders of any State Commission;

iv) appeals against the orders of the Central Authority; and

b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has

- exercised a jurisdiction not vested in it by law, or
- has failed to exercise a jurisdiction so vested, or
- has acted in the exercise of its jurisdiction illegally or with material irregularity.

2) The jurisdiction, powers and authority of the National Commission may be exercised by its Benches and a Bench may be constituted by the President with one or more required members.

The senior-most member of the Bench presides over the Bench.

3) If the members of a Bench differ in opinion on any point, the points are decided according to the opinion of the majority, if there is a majority.

If the members are equally divided, then they should state the point or points on which they differ, and make a reference to the President who either heard the point or points himself or refer the case for hearing on such point or points by one or more of the other members and such point or points are decided according to the opinion of the majority of the members who have heard the case, including those who first heard it:

The President or the other member should give opinion on the point or points so referred within a period of two months from the date of such reference.

G. PROCEDURE APPLICABLE TO NATIONAL COMMISSION (Sec. 59):

1) The provisions relating to complaints under sections 35, 36, 37, 38 and 39 with necessary modifications are applicable to the disposal of complaints by the National Commission.

2) The National Commission may also declare any terms of contract, which is unfair to any consumer as null and void.

If the Central Government deems it necessary so to do, it may prescribe such other value.

ii) complaints against unfair contracts, where the value of goods or services paid as consideration exceeds ten crore rupees;

iii) appeals against the orders of any State Commission;

iv) appeals against the orders of the Central Authority; and

b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has

- exercised a jurisdiction not vested in it by law, or
- has failed to exercise a jurisdiction so vested, or
- has acted in the exercise of its jurisdiction illegally or with material irregularity.

2) The jurisdiction, powers and authority of the National Commission may be exercised by its Benches and a Bench may be constituted by the President with one or more required members.

The senior-most member of the Bench presides over the Bench.

3) If the members of a Bench differ in opinion on any point, the points are decided according to the opinion of the majority, if there is a majority.

If the members are equally divided, then they should state the point or points on which they differ, and make a reference to the President who either heard the point or points himself or refer the case for hearing on such point or points by one or more of the other members and such point or points are decided according to the opinion of the majority of the members who have heard the case, including those who first heard it:

The President or the other member should give opinion on the point or points so referred within a period of two months from the date of such reference.

G. PROCEDURE APPLICABLE TO NATIONAL COMMISSION (Sec. 59):

1) The provisions relating to complaints under sections 35, 36, 37, 38 and 39 with necessary modifications are applicable to the disposal of complaints by the National Commission.

2) The National Commission may also declare any terms of contract, which is unfair to any consumer as null and void.

H. REVIEW BY NATIONAL COMMISSION IN CERTAIN CASES (Sec. 60):

The National Commission has the power to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties **within thirty days** of such order.

I. POWER TO SET ASIDE EX PARTE ORDERS (Sec. 61)

If an order is passed by the National Commission ex parte, the aggrieved party may make an application to the Commission for setting aside such order.

J. TRANSFER OF CASES (Sec. 62)

On the application of the complainant or of its own motion, the National Commission may, at any stage of the proceeding, in the interest of justice, transfer any complaint pending before the District Commission of one State to a District Commission of another State or before one State Commission to another State Commission.

K. VACANCY IN OFFICE OF PRESIDENT OF NATIONAL COMMISSION (Sec. 63):

When the office of President of the National Commission is vacant or a person occupying such office is, by reason of absence or otherwise, unable to perform the duties of his office, these are performed by the senior-most member of the National Commission:

If a retired Judge of a High Court or a person who has been a Judicial Member is a member of the National Commission, such member or where the number of such members is more than one, the senior-most person amongst such members, presides over the National Commission in the absence of President of that Commission.

L. VACANCIES OR DEFECTS IN APPOINTMENT NOT TO INVALIDATE ORDERS (Sec. 64):

No act or proceeding of the District Commission, the State Commission or the National Commission is invalid by reason only of the existence of any vacancy amongst its members or any defect in its constitution.

M. SERVICE OF NOTICE, ETC.(Sec. 65):

1) All notices, required to be served, are served by delivering or transmitting a copy by registered post acknowledgment due addressed to opposite party or to the complainant by speed post or by approved courier service, or by any other mode of transmission of documents including electronic means.

2) The notice required by this Act may be served on an electronic service provider and the electronic service provider designates a nodal officer to accept and process such notices.

3) When

- an acknowledgment or any other receipt purporting to be signed by the opposite party or his agent or by the complainant is received by the District/State/National Commission, or

- postal article containing the notice is received back by such Commissions, with an endorsement made by a postal employee or by any person authorised by the courier service to the effect that the opposite party or his agent or complainant had refused to take delivery of the postal article containing the notice or had refused to accept the notice

- by any other means when tendered or transmitted to him, then such Commissions declare that the notice has been duly served on the opposite party or to the complainant.

The notice should be properly addressed, pre-paid and duly sent by registered post acknowledgment due. Then ia declaration made to that effect is sufficient, even if the acknowledgment has been lost or misplaced, or for any other reason, has not been received by the Commissions within thirty days from the date of issue of notice.

4) All notices required to be served on an opposite party or to complainant is deemed to be sufficiently served, if addressed in the case of the opposite party, to the place where business or profession is carried on, and in case

of the complainant, the place where such person actually and voluntarily resides.

N. EXPERTS TO ASSIST NATIONAL COMMISSION OR STATE COMMISSION (Sec. 66):

If the National Commission or the State Commission, on an application by a complainant or otherwise, is of the opinion that it involves the larger interest of consumers, it may direct any individual or organisation or expert to assist the National Commission or the State Commission.

O. APPEAL AGAINST THE ORDER OF NATIONAL COMMISSION (Sec. 67):

Any person, aggrieved by an order made by the National Commission may prefer an appeal against to the Supreme Court within thirty days from the date of the order:

The Supreme Court may entertain an appeal after the expiry of thirty days if there was sufficient cause for not filing it within that period.

No appeal is entertained by the Supreme Court unless fifty per cent. of the award amount is deposited in the prescribed manner.

P. FINALITY OF ORDERS (Sec. 68):

Every order of a District Commission or the State Commission or the National Commission, if no appeal has been preferred against such order is final.

Q. LIMITATION PERIOD (Sec. 69):

1) The District Commission, the State Commission or the National Commission does not admit a complaint unless it is filed within two years from the date of cause of action.

2) However, if the complainant satisfies the District Commission, the State Commission or the National Commission, that he had sufficient cause for not filing the complaint within such period, then such complaint is entertained only after it records its reasons for condoning such delay.

R. ADMINISTRATIVE CONTROL (SEC. 70)

1) The National Commission has the authority to lay down adequate standards in consultation with the Central Government for better protection of the interests of consumers and for that purpose, has administrative control over all the State Commissions in the following matters, namely:—

   a) monitoring performance of the State Commissions in terms of their disposal by calling for periodical returns regarding the institution, disposal and pendency of cases;

   b) investigating into any allegations against the President and members of a State Commission and submitting inquiry report to the State Government

along with copy endorsed to the Central Government for necessary action;

c) Issuance of instructions regarding adoption of uniform procedure in the hearing of matters, prior service of copies of documents produced by one party to the opposite parties, furnishing of english translation of judgments written in any language, speedy grant of copies of documents;

d) Overseeing the functioning of the State Commission or the District Commission either by inspection or by any other means to ensure that the objects and purposes of the Act are best served and the standards set by the National Commission are implemented without interfering with their quasi-judicial freedom.

2) There is a monitoring cell constituted by the President of the National Commission to oversee the functioning of the State Commissions from the administrative point of view.

3) The State Commission has administrative control over all the District Commissions within its jurisdiction.

4) The National Commission and the State Commissions furnish to the Central Government periodically or as and when required, any information including the pendency of cases in prescribed form and manner.

5) The State Commission furnishes periodically or as and when required to the State Government any information including pendency of cases in prescribed form and manner.

S. ENFORCEMENT OF ORDERS OF DISTRICT COMMISSION, STATE COMMISSION AND NATIONAL COMMISSION (Sec. 71):

Every order made by a District Commission, State Commission or the National Commission is enforced by it in the same manner as if it were a decree made by a Court in a suit before it and the provisions of Order XXI of the First Schedule to the Code of Civil Procedure, 1908 is applicable, subject to the modification that every reference therein to the decree should be construed as reference to the order made under this Act.

T. PENALTY FOR NON COMPLIANCE OF ORDERS (Sec. 72)

1) If any person fails to comply with any order made by the District Commission or the State Commission or the National Commission, he is punishable with imprisonment of not less than one month, but upto three years or fine of not less than twenty-five thousand rupees, and upto one lakh rupees or both.

2) The District Commission, the State Commission or the National Commission has the power of a Judicial Magistrate of first class for the trial of above offences

and on conferment of such powers, the District Commission or the State Commission or the National Commission is deemed to be a Judicial Magistrate of first class for the purposes of the Code of Criminal Procedure, 1973.

3) The offences under sub-section (1) are tried summarily by the District Commission or the State Commission or the National Commission.

U. APPEAL AGAINST ORDER PASSED UNDER SECTION 72 (Sec. 74):

1) Appeal lies both on facts and on law from—

a) The order made by the District Commission to the State Commission;

b) The order made by the State Commission to the National Commission; and

c) The order made by the National Commission to the Supreme Court.

2) No appeal lies before any court from any order of a District Commission or a State Commission or the National Commission.

3) Every appeal is preferred within thirty days from the date of order of a District Commission or a State Commission or the National Commission.

However, the State Commission or the National Commission or the Supreme Court may entertain an appeal after the expiry of the said thirty days, if the appellant had sufficient cause for not preferring the appeal within the said period of thirty days.

UNIVERSITY QUESTIONS FOR REVIEW:

1) *Explain the constitution, powers and functions of the National Commission.*

2) *What is the constitution , jurisdiction , powers and functions of National Commission?*

3) *Write short note on- a) National Commission b) Jurisdiction of National Commission. c) Appeal to Supreme Court from National Commission.*

21. MEDIATION (Sec 74 to 81)

SYNOPSIS:

A. Meaning

B. Establishment of Mediation Cell under CPA,2019 (Sec. 74)

C. Panel of Mediators (Sec. 75)

D. Duties of Mediator (Sec. 77)

E. Replacement of Mediator (Sec. 78)

F. Mediation Proceedings (Sec. 79)

G. When Agreement reached in Mediation (Sec 80)

H. When No Agreement reached in Mediation (Sec.80)

I. Post Mediation Proceedings (Sec. 81)

A. MEANING:

Mediation is one of the Alternative Dispute Resolution System methods. Since courts and tribunals are loaded with huge number of cases for trials and judgements, ADRS helps to reduce the number of cases by attempting compromise settlements in such cases by adopting simple procedures

In mediation, the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences and attempts settlement.

B. ESTABLISHMENT OF MEDIATION CELL UNDER CPA,2019 (Sec. 74):

1) The State Government establishes a consumer mediation cell to be attached to each of the District Commissions and the State Commissions of that State.

2) The Central Government establishes a 'Consumer Mediation Cell' to be attached to the National Commission and each of the Regional Benches.

3) A consumer mediation cell consists of prescribed persons.

4) Every consumer mediation cell maintains—

(a) a list of empanelled mediators;

(b) a list of cases handled by the cell;

(c) record of proceeding; and

(d) any other specified information.

5) Every consumer mediation cell should submit a quarterly report to the District Commission, State Commission or the National Commission in the prescribed manner.

C. PANEL OF MEDIATORS (Sec. 75):

1) For the purpose of mediation, the National Commission or the State Commission or the District Commission

should prepare a panel of the mediators to be maintained by the consumer mediation cell attached to it, on the recommendation of a selection committee consisting of the President and a member of that Commission.

2) The qualifications and experience required for empanelment as mediator, the procedure for empanelment, the manner of training empanelled mediators, the fee payable to empanelled mediator, the terms and conditions for empanelment, the code of conduct for empanelled mediators, the grounds on which, and the manner in which, empanelled mediators are removed or empanelment is cancelled and other matters relating thereto, are such as specified by regulations.

3) The panel of mediators prepared is valid for a period of five years, and the empanelled mediators are eligible to be considered for re-empanelment for another term.

4) The District Commission, the State Commission or the National Commission, while nominating any person from the panel of mediators, consider his suitability for resolving (settling) the consumer dispute involved.(Sec 76)

D. DUTIES OF MEDIATOR (Sec. 77):

It is the duty of the mediator to disclose—

a) His personal, professional or financial interest in the outcome of the consumer dispute;

b) The circumstances which may give rise to a justifiable doubt as to his independence or impartiality; and

c) Such other specified facts.

E. REPLACEMENT OF MEDIATOR (Sec. 78):

If the District Commission or the State Commission or the National Commission is satisfied, on the information furnished by the mediator or on the information received from any other person including parties to the complaint and after hearing the mediator, it replaces such mediator by another mediator.

F. MEDIATION PROCEEDINGS (Sec. 79):

1) The mediation is held in the consumer mediation cell attached to the District Commission, the State Commission or the National Commission.

2) If a consumer dispute is referred for mediation by the District Commission or the State Commission or the National Commission, the mediator nominated by such Commission should have regard to

- The rights and obligations of the parties,
- The usages of trade,
- The circumstances giving rise to the consumer dispute and
- Other necessary relevant factors.

4) The mediator should be guided by the principles of natural justice while carrying out mediation.

5) The mediator so nominated should conduct mediation within specified time and in specified manner.

G. WHEN AGREEMENT IS REACHED IN MEDIATION (Sec. 80)

1) Pursuant to mediation, if an agreement is reached between the parties with respect to all of the issues involved in the consumer dispute or with respect to only some of the issues, the terms of such agreement is reduced to writing accordingly, and signed by the parties to such dispute or their authorised representatives.

2) The mediator prepares a settlement report of the settlement and forward the signed agreement along with such report to the concerned Commission.

H. WHEN NO AGREEMENT IS REACHED IN MEDIATION (Sec 80):

If no agreement is reached between the parties within the specified time or the mediator is of the opinion that settlement is not possible, he prepares his report accordingly and submit the same to the concerned Commission.

I. POST MEDIATION PROCEEDINGS (Sec. 81):

1) The District Commission or the State Commission or the National Commission, within seven days of the

receipt of the settlement report, pass suitable order recording such settlement of consumer dispute and dispose of the matter accordingly.

2) If the consumer dispute is settled only in part, the District Commission or the State Commission or the National Commission records settlement of the issues which have been so settled and continue to hear other issues involved in such consumer dispute.

3) If the consumer dispute could not be settled by mediation, the District Commission or the State Commission or the National Commission continues to hear all the issues involved in such consumer dispute and passes suitable orders.

UNIVERSITY QUESTIONS FOR REVIEW :

1) *Explain the role of Mediation in settlement of consumer disputes under the Consumer Protection Act, 2019.*

2) *The mediation proceedings is a novel feature of the Consumer Protection Act, 2019 —Discuss.*

3) *Write short note on - Mediation proceedings under the Consumer Protection Act, 2019.*

22. PRODUCT LIABILITY [Sec. 82 to 87)

SYNOPSIS:

A. ***Compensation under product liability: (Sec. 82 &83)***

B. ***Liability of a Product Manufacturer(Sec. 84)***

C. ***Liability of a Service Provider(Sec. 85)***

D. ***Liability of a Product Seller (Sec. 86)***

E. ***Non- Liability of a Product Seller[(Sec. 87(1)]***

F. ***Non- Liability of a Product Manufacturer [(Sec. 87(2)]***

– Product Liability is the legal liability incurred by a manufacturer or trader for producing or selling a faulty product. The product manufactured/ traded may cause damage or loss to properties, and injuries/ death to its users and third parties.

The persons affected by such products can claim compensation from the manufacturers and traders by filing complaint before the competent Consumer Forums.

A. COMPENSATION UNDER PRODUCT LIABILITY: (Sec. 82 & 83)

1. Every claim for compensation under a product liability action arises by a complainant by an affected consume. It is for any harm caused by a defective product.

- manufactured by a product manufacturer or
- serviced by a product service provider or
- sold by a product seller.(Sec. 82)

2. A product liability action may be brought by a complainant against.
   - a product manufacturer or
   - a product service provider or
   - a product seller or any harm caused to him on account of a defective product.(Sec. 83)

B. LIABILITY OF PRODUCT MANUFACTURER (Sec. 84):

1. A product manufacturer is liable in a product liability action, if —
   a. The product contains a manufacturing defect; or
   b. The product is defective in design; or
   c. There is a deviation from manufacturing specifications; or
   d. The product does not conform to the express warranty; or
   e. The product fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage.

2. A product manufacturer is liable in a product liability action even if he proves that he was not negligent or fraudulent in making the express warranty of a product.

C. LIABILITY OF SERVICE PROVIDER (Sec. 85):

A product service provider is liable in a product liability action, if—

a. The service provided by him was

- Faulty or
- Imperfect or
- Deficient or inadequate in quality, nature or manner of required performance under any law or pursuant to any contract or otherwise; or

b. There was an act of

- omission or
- commission or
- negligence or
- conscious withholding any information which caused harm; or

c. The service provider did not issue adequate instructions or warnings to prevent any harm; or

d. The service did not conform to express warranty or the terms and conditions of the contract.

D. LIABILITY OF PRODUCT SELLER (Sec. 86):

A product seller who is not a product manufacturer is liable in a product liability action,if—

a. He has exercised substantial control over the

- designing,
- testing,
- manufacturing,
- packaging or
- labelling of a product that caused harm; or

b. He has altered or modified the product and such alteration or modification was the substantial factor in causing the harm; or

c. He has made an express warranty of a product independent of any express warranty made by a manufacturer and such product failed to conform to the express warranty made by the product seller which caused the harm; or

d. The product has been sold by him and

- the identity of product manufacturer of such product is not known, or
- if known, the service of notice or process or warrant cannot be effected on him or
- he is not subject to the law which is in force in India or the order, if any, passed or to be passed cannot be enforced against him; or

c. he failed to exercise reasonable care in assembling, inspecting or maintaining such product or

- he did not pass on the warnings or instructions of the product manufacturer regarding the dangers involved or proper usage of the product while selling such product and such failure was the proximate cause of the harm.

E. NON- LIABILITY OF PRODUCT SELLER (Sec. 87(1):

A product liability action cannot be brought against the product seller if, at the time of harm, the product was misused, altered, or modified by the consumer.

F. NON- LIABILITY OF PRODUCT MANUFACTURER: [(Sec. 87(2)]

1. In any product liability action based on the failure to provide adequate warnings or instructions, the product manufacturer is not liable, if—

   a. The product was purchased by an employer for use at the workplace and the product manufacturer had provided warnings or instructions to such employer;

   b. The product was sold as a component or material to be used in another product and necessary warnings or instructions were given by the product manufacturer to the purchaser of such component or material, but the harm was caused to the complainant by use of the end product in which such component or material was used;

c. The product was one legally meant to be used or dispensed only under the supervision of an expert or a class of experts and the product manufacturer had employed reasonable means to give the warnings or instructions for usage of such product to such expert or class of experts; or

d. the complainant, while using such product, was under the influence of alcohol or any prescription drug which had not been prescribed by a medical practitioner.

2. A product manufacturer is not liable for failure to instruct or warn about a danger which is obvious or commonly known to the user or consumer of such product or which, such user or consumer, ought to have known, taking into account the characteristics of such product.

UNIVERSITY QUESTIONS FOR REVIEW

1. *Explain Product Liability. Who are all liable for product liability?*
2. *When does product liability arise? Also explain the circumstances under which a product manufacturer/a product service provider /a product seller becomes liable?*
3. *Write short note on-Product Liability.*

23. OFFENCES AND PENALTIES
(UNDER THE CONSUMER PROTECTION ACT, 2019)
(Sec. 88 to 93)

SYNOPSIS:

A. ***Punishment for failure to comply with any direction of the Central Authority (Sec.88)***

B. ***Punishment of Manufacturer/Service Provider for causing false or misleading advertisement prejudicial to the interest of consumers (Sec.89)***

C. ***Punishment of persons manufacturing for sale or storing or selling or distributing or importing any product containing an adulterant(Sec.90)***

D. ***Punishment of persons manufacturing for sale or storing or selling or distributing or importing any spurious goods(Sec.91)***

E. ***Complaint filed by the Central Authority or any officer (Sec. 92)***

F. ***Punishment if no reasonable grounds for Search/ Seizure (Sec.93)***

A. PUNISHMENT FOR FAILURE TO COMPLY WITH ANY DIRECTION OF CENTRAL AUTHORITY (Sec. 88):

If any person fails to comply with any direction of the Central Authority is punished with imprisonment to six months or with fine which may extend to twenty lakh rupees, or with both.

B. PUNISHMENT OF MANUFACTURER/SERVICE PROVIDER FOR CAUSING FALSE OR MISLEADING ADVERTISEMENT PREJUDICIAL TO THE INTEREST OF CONSUMERS (Sec. 89)

Any manufacturer or service provider who causes a false or misleading advertisement which is prejudicial to the interest of consumers is punished with imprisonment upto two years and fine upto ten lakh rupees; and for every subsequent offence, he is punished with imprisonment upto five years and fine upto fifty lakh rupees.

C. PUNISHMENT OF PERSONS MANUFACTURING FOR SALE OR STORING OR SELLING OR DISTRIBUTING OR IMPORTING ANY PRODUCT CONTAINING AN ADULTERANT(Sec. 90):

1) If any person by himself or by any other person manufactures for sale or stores or sells or distributes or imports any product containing an adulterant is punished, and if such act—

   a) does not result in any injury to the consumer, then the person is punished with imprisonment upto six months and fine upto one lakh rupees;

   b) causes injury not amounting to grievous hurt to the consumer, then the person is punished with imprisonment upto one year and fine upto three lakh rupees;

c) causes injury resulting in grievous hurt to the consumer, then the person is punished with imprisonment upto seven years and fine upto five lakh rupees; and

d) results in the death of a consumer, then the person is punished with imprisonment of not less than seven years, but which upto imprisonment for life and fine not less than ten lakh rupees.

2) The offences under clauses (c) and (d) of sub-section (1) are cognizable and non-bailable.

3) The court may, in case of first conviction, suspend any licence issued to the person for a period up to two years, and in case of second or subsequent conviction, cancel the licence.

Explanation.—For the purposes of this section,—

a) "adulterant" means any material including extraneous matter which is employed or used for making a product unsafe;

b) "grievous hurt" has the same meaning as assigned to it in section 320 of the Indian Penal Code.

D. PUNISHMENT OF PERSONS MANUFACTURING FOR SALE OR STORING OR SELLING OR DISTRIBUTING OR IMPORTING ANY SPURIOUS GOODS(Sec. 91):

1) If any person, by himself or by any other person manufactures for sale or stores or sells or distributes

or imports any spurious goods is punished, and if such act—

a) Causes injury not amounting to grievous hurt to the consumer, then the person is punished with imprisonment upto one year and fine upto three lakh rupees;

b) Causes injury resulting in grievous hurt to the consumer, then the person is punished with imprisonment upto seven years and fine upto five lakh rupees;

c) Results in the death of a consumer, then the person is punished with imprisonment not less than seven years, but extends to imprisonment for life and fine not less than ten lakh rupees.

2) The offences under clauses (b) and (c) of sub-section (1) shall be cognizable and non-bailable.

3) The court may, in case of first conviction, suspend any licence issued to the person for two years, and in case of second or subsequent conviction, cancel the licence.

E. COMPLAINT FILED BY THE CENTRAL AUTHORITY OR ANY OFFICER (Sec. 92):

Cognisance is taken by a competent court of any offence under sections 88 and 89, only on a complaint filed by the Central Authority or any authorised officer.

F. PUNISHMENT IF NO REASONABLE GROUNDS FOR SEARCH/ SEIZURE (Sec. 93):

If the Director General or any other officer, exercising powers under section 22, knows that there are no reasonable grounds for so doing, and yet—

a) Searches, or causes to be searched any premises; or

b) Seizes any record, register or other document or article, then he is, for every such offence, punished with imprisonment upto one year, or fine upto ten thousand rupees or with both.

UNIVERSITY QUESTIONS FOR REVIEW:

1) *Explain the provisions relating to Offences and Punishment under the Consumer Protection Act,2019.*

2) *The Consumer Protection Act,2019 has penal provisions for violation of certain provisions- Discuss.*

3) *Write short note on- Offences and Penalties under the Consumer Protection Act, 2019.*

24. MISCELLANEOUS (Sec. 94 to 107)

SYNOPSIS:

A. *Measures for preventing unfair trade practices in e-commerce (Sec. 94)*
B. *Consumer Authorities - Public Servants (Sec. 95)*
C. *Compounding of offences (Sec. 96)*
D. *Penalty fund (Sec. 97)*
E. *No suit, prosecution or other legal proceeding for acts done in good faith (Sec. 98)*
F. *Bound by the directions of the Central Government (Sec. 99)*
G. *Act is addition to and not in derogation (Sec. 100)*
H. *Rule making power of the Central Government (Sec. 101)*
I. *State Governments' powers to make rules (Sec.102)*
J. *Power of National Commission to make regulations(Sec. 103)*
K. *Power of Central Authority to make regulations (Sec. 104)*
L. *Laying before the Parliament (Sec. 105)*
M. *Removing difficulty in giving effect to the Act (Sec. 106)*
N. *Repeal of the Consumer Protection Act, 1986(Sec. 107)*

A. MEASURES FOR PREVENTING UNFAIR TRADE PRACTICES IN E-COMMERCE (Sec. 94):

For preventing unfair trade practices in e-commerce, and direct selling and also to protect the interest and rights of consumers, the Central Government takes prescribed measures.

B. CONSUMER AUTHORITIES - PUBLIC SERVANTS (Sec. 95)

The Presidents and members of the District Commission, the State Commission and the National Commission, and their officers and other employees, the Chief Commissioner and the Commissioner of the Central Authority, the Director General, the Additional Director General, the Director, the Joint Director, the Deputy Director and the Assistant Director and all other officers and employees of the Central Authority and other persons performing any duty under this Act are deemed to be public servants u/s 21 IPC.

C. COMPOUNDING OF OFFENCES (Sec. 96):

1) Any offence punishable under sections 88 and 89, may be compounded, on payment of prescribed amount. However, no compounding of such offence is made without the leave (permission) of the court.

   Further, such amount should not exceed the maximum amount of the fine, which may be imposed under this Act for the offence so compounded.

2) The Central Authority or any specially authorised officer may compound offences.

3) Compounding of offence does not apply to a person who commits the same or similar offence within a period of three years from the date on which the first offence committed by him was compounded.

Explanation.—Any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, is deemed to be a first offence.

4) Once an offence has been compounded,no proceeding is taken against the offender in respect of the offence so compounded.

5) The acceptance of the sum of money for compounding an offence by the Central Authority is deemed to amount to an acquittal under Cr. P. C.

D. PENALTY FUND (Sec. 97):

The penalty collected under section 21 and the amount collected under section 96 ate credited to prescribed fund.

E. NO SUIT, PROSECUTION OR OTHER LEGAL PROCEEDING FOR ACTS DONE IN GOOD FAITH(Sec. 98)

No suit, prosecution or other legal proceeding lie against the Presidents and members of the District Commission, the State Commission and the National Commission, the

Chief Commissioner, the Commissioner, any officer or employee and other person performing any duty under this Act, for any act which is in good faith done.

F. BOUND BY THE DIRECTIONS OF THE CENTRAL GOVERNMENT(Sec. 99):

1) The Central Authority, in exercise of its powers or the performance of its functions under this Act, id bound by the directions of the Central Government on questions of policy.However, the Central Authority is given an opportunity to express its views before any direction is given.

2) The decision of the Central Government whether a question is one of policy or not is final

G. ACT IS ADDITION TO AND NOT IN DEROGATION(Sec. 100):

The provisions of this Act are in addition to and not in derogation of the provisions of any other law.

H. RULE MAKING POWER OF CENTRAL GOVERNMENT (Sec. 101):

1) The Central Government may make rules for carrying out any of the provisions contained in this Act.

2) Such rules may provide for, —

a) The other class / classes of persons including public utility entities.

b) The contest, lottery, game of chance or skill which are exempted.

c) The manner of issuing bill or cash memo or receipt for goods sold or services.

d) The number of other official or non-official members of the Central Council.

e) The time and place of meeting of Central Council and the procedure for the transaction of its business.

f) The number of Commissioners in the Central Authority.

g) The qualifications for appointment, method of recruitment, procedure of appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the Chief Commissioner and other Commissioners of the Central Authority.

h) The salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the Central Authority.

i) The qualifications for appointment of Director General, Additional Director General, Director, Joint Director, Deputy Director and Assistant Director and the manner of appointment.

j) The manner of taking copies or extracts of document, record or article seized or produced before returning to the person.

k) The officer and the manner of disposing of articles which are subject to speedy or natural decay.

l) The form and manner for preparing annual statement of accounts by the Central Authority in consultation with the Comptroller and Auditor-General of India.

m) The form in which, and the time within which, an annual report, other reports and returns may be prepared by the Central Authority.

n) The qualifications for appointment, method of recruitment, procedure for appointment, term of office, resignation and removal of President and members of the District Commission.

o) The other value of goods and services in respect of which the District Commission shall have jurisdiction to entertain complaints.

p) The manner of electronically filing complaint.

q) The fee, electronic form and the manner of payment of fee for filing complaint.

r) The cases which may not be referred for settlement by mediation.

s) The manner of authentication of goods sampled in case of the National Commission.

t) Any other prescribed matter.

u) The fund where the amount obtained may be credited and the manner of utilisation of such amount.

v) The form and the manner in which appeal may be preferred to the State Commission.

w) The qualifications for appointment, method of recruitment, procedure for appointment, term of office, resignation and removal of the President and members of the State Commission.

x) The other value of goods and services in respect of which the State Commission has jurisdiction.

y) The form and manner of filing appeal to the National Commission, and the manner of depositing fifty per cent. of the amount before filing appeal.

z) The number of members of the National Commission.

za) The qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the President and members of the National Commission.

zb) The salaries and allowances payable to, and other terms and conditions of service of, the officers and other employees of the National Commission.

zc) The other value of goods and services in respect of which the National Commission shall have jurisdiction.

zd) The manner of depositing fifty per cent.of the amount.

ze) The form in which the National Commission and the State Commission shall furnish information to the Central Government.

zf) The persons in the consumer mediation cell.

zg) The measures to be taken by the Central Government to prevent unfair trade practices in e-commerce, direct selling.

zh) The amount for compounding offences.

zi) The fund to which the penalty and amount collected shall be credited

zj) Any other prescribed matter in respect of which provisions are to be made by rules.

I. STATE GOVERNMENTS' POWERS TO MAKE RULES (Sec. 102):

The State Governments may make rules for carrying out the provisions of this Act:

However, the Central Government may frame model rules in the matters in which the State Government may make rules.

1) If any model rules have been framed in any such matter, they apply to the State until the rules are made by the State Government. While making any such rules, the State government conforms to the model rules.

2) The rules framed by the State government may provide for the following matters, namely:—

   a) The other class or classes of persons including public utility entities.

   b) The contest, lottery, game of chance or skill which are to be exempted.

   c) The number of other official or non-official members of the State Council

   d) The time and place of meeting of the State Council and the procedure for the transaction of its business

   e) The number of other official and non-official members of District Council

   f) The time and place of meeting of the District Council and procedure for the transaction of its business

g) The number of members of the District Commission

h) The salaries and allowances payable to, and other terms and conditions of service of, the President and members of the District Commission

i) The salaries and allowances payable to, and other terms and conditions of service of, the officers and other employees of the District Commission.

j) The manner of authentication of goods sampled by the State Commission and the District Commission;

k) The manner of depositing fifty per cent. of the amount before filing appeal.

l) The number of members of the State Commission.

m) The salaries and allowances payable to, and other terms and conditions of service of, the President and members of the State Commission.

n) The salaries and allowances payable to, and other terms and conditions of service of, the officers and other employees of the State Commission

o) The form in which the State Commission shall furnish information to the State Government.

p) The persons in the consumer mediation cell

q) Any other prescribed matter in respect of which provisions are to be made by rules.

J. POWER OF NATIONAL COMMISSION TO MAKE REGULATIONS (Sec. 103):

1) The National Commission may make regulations not inconsistent with this Act to provide for all matters for which provision is necessary for giving effect to the provisions of this Act.

2) Such regulations may make provisions for—

a) The costs for adjournment to be imposed by the District Commission.

b) The costs for adjournment to be imposed by the State Commission or the National Commission.

c) The maintenance of any other information by the consumer mediation cell.

d) The manner of submission of quarterly report by consumer mediation cell to the District Commission, the State Commission or the National Commission.

e) The qualifications and experience required for empanelment as mediator, the procedure for empanelment, the manner of training empanelled mediators, the fee payable to empanelled mediator, the terms and conditions for empanelment, the code

of conduct for empanelled mediators, the grounds on which, and the manner in which, empanelled mediators is removed or empanelment is cancelled and the other incidental matters.

f) The conditions for re-empanelment of mediators for another term.

g) The other facts to be disclosed by mediators.

h) The time within which, and the manner in which, mediation may be conducted.

i) Such other matter for which provision is to be made by regulation.

K. POWER OF CENTRAL AUTHORITY TO MAKE REGULATIONS (Sec. 104):

1) The Central Authority may make regulations not inconsistent with this Act, for the purpose of giving effect to the provisions of this Act.

2) Such regulations may provide for all or any of the following matters, namely:—

a) The procedure for engaging experts and professionals and the number of such experts and professionals.

b) The procedure for transaction of business and the allocation of business of the Chief Commissioner and Commissioner.

c) The form, manner and time within which, inquiries or investigation made by the Director-General is submitted to the Central Authority.

d) Such other matter for which provision is to be made by regulation.

L. LAYING BEFORE THE PARLIAMENT (Sec. 105):

1) Every rule and every regulation made under this Act is laid as soon as may be after it is made before each House of Parliament, while it is in session, for a total period of thirty days. Both the Houses may agree in making any modification in the rule or regulation

2) Every rule made by a State Government under this Act is laid as soon as may be after it is made before the State Legislature.

M. REMOVING DIFFICULTY IN GIVING EFFECT TO THE ACT (Sec. 106):

If any difficulty arises in giving effect to the provisions of this Act, the Central Government may make necessary provisions not inconsistent with the provisions of this Act for removing the difficulty:

However, no such order is made after the expiry of a period of two years from the commencement of this Act.

II. REPEAL OF THE CONSUMER PROTECTION ACT, 1986 (Sec. 107)

1) The Consumer Protection Act, 1986 is hereby repealed.

2) Anything done or any action taken under the Act, 1986 hereby repealed, in so far as it is not inconsistent with the provisions of this Act, is deemed to have been done or taken under the corresponding provisions of the present Act.

3) The mention of particular matters is held not to prejudice or affect the general application of section 6 of the General Clauses Act,1897 with regard to the effect of repeal.

UNIVERSITY QUESTIONS FOR REVIEW:

1) *What are the miscellaneous provisions under the Consumer Protection Act, 2019?*

2) *Explain the Rule making power of the Central Government, Central Authority and State Government.*

3) *Write short note on-a)Miscellaneous provisions. b) Rule making power under the Act. c) Repeal.*

UNIT - V

II. THE MOTOR VEHICLES ACT, 1988 AND AMENDMENT ACT, 2019

1. SALIENT PROVISIONS IN THE MOTOR VEHICLES (AMENDMENT) ACT, 2019 AND COMPARISON WITH THE MOTOR VEHICLES ACT, 1988

(OR)

CHANGES BROUGHT ABOUT BY THE MOTOR VEHICLES (AMENDMENT) ACT, 2019

SYNOPSIS:

A. ***Safety of pedestrians and Non-Motorised Transport***
B. ***Safety of children during their travel***
C. ***Recalling of vehicles***
D. ***Penalties for Faulty Road Design, Faulty Engineering and Faulty Road Maintenance***
E. ***Efficient driver's licensing system***
F. ***Registration of new motor vehicles by vehicle dealers***
G. ***Strict regulation of heavy motor vehicles (HMVS)***
H. ***Stringent punishment for drunk-driving, over-speeding, violation of helmet and seat-belt laws***

I. ***Revision of fines***

J. ***Electronic Monitoring And Enforcement Of Road Safety***

K. ***Offences By Juveniles***

L. ***Dangerous Driving***

M. ***Penalty For Offences Related To Construction And Maintenance Of Vehicles***

N. ***Cashless Treatment Of Victims Of Road Accidents***

O. ***Protection Of Good Samaritan***

P. ***Motor Vehicles Accident Fund***

Q. ***National Road Safety Board***

R. ***Transport Technology Aggregator***

S. ***National Transportation Policy***

T. ***Penalty Multiplier***

U. ***Hit And Run Cases***

V. ***No Fault Liability Cases***

W. ***Fault Liability Cases***

X. ***Conclusion***

The objective of the Motor Vehicles Amendment Act,2019 is to ensure road safety, enhanced compensation to the victims of accidents, third party insurance and the health of the vehicles.

The important changes brought about by the Motor Vehicles Amendment Act, 2019 in comparison with the Motor Vehicles Act 1988 are as below-

A. SAFETY OF PEDESTRIANS AND NON-MOTORISED TRANSPORT:

The Motor Vehicles Act, 1988 had no provisions for the safety of pedestrians and non-motorised road users.

Whereas sec. 138 (1A) of the present Motor Vehicles (Amendment) Act, 2019 authorises the State Governments to regulate the activities of pedestrians and non-motorised road users in a public place.

The regulation of activities in a public place of pedestrians and non-motorised road users include **'Creation of Special Traffic Zones'** such as separate Cycle Tracks and Footpaths, Non-Motorised Transport (NMT) Lanes etc.,

B. SAFETY OF CHILDREN DURING THEIR TRAVEL:

In the Motor Vehicles Act, 1988, there were no provisions to protect children during their travel to school and back. Whereas section 194 B of the present Motor Vehicles (Amendment) Act, 2019 makes it compulsory for every child to be secured by a safety belt or a child-restraint system.

Further, the section also provides for adult accountability. If adults accompanying children do not provide them proper and seating, they are punished with a penalty of Rs. 1000/-

Further, amendment to Section 129 (Wearing of protective headgear) provides that every child above the age

of four years being carried on a motorcycle must wear a helmet. The design and specifications of the helmet are prescribed by the Central Government.

Moreover, Sec. 137 (2)(aa) of the 2019 Act mandates the Central Government to provide for standards of protective gear, and measures for safety of children below the age of four years while riding on a motor cycle.

C. RECALLING OF VEHICLES:

In the Motor Vehicles Act, 1988, there was no provision to recall vehicles which were old or harmful to the environment or did not meet safety standards.

However, in Motor Vehicles (Amendment) Act, 2019, new provisions 110A and 110B empower Central Government to recall vehicles which do not meet standards. The Act also provides for establishment of 'Testing Agencies' for issuing certificates of approval.

D. PENALTIES FOR FAULTY ROAD DESIGN, FAULTY ENGINEERING AND FAULTY ROAD MAINTENANCE:

In the Motor Vehicles Act, 1988, there was no provision to make road contractors and civic agencies accountable for faulty road design and non-maintenance of roads leading to accidents.

Whereas section 198A of the Motor Vehicles (Amendment) Act, 2019 holds road contractors, consultants or concessionaires accountable for faulty road designs,

construction and its maintenance. The failure to do so is fined upto Rs. One lakh.

E. EFFICIENT DRIVER'S LICENSING SYSTEM:

In the Motor Vehicles Act, 1988, there was no centralised database of all licences in India. This led to a situation where a person may have multiple licences from different States.

Further, Section 9 (3) of the Act,1988 exempted applicants of drivers' licences to take the test of competence, if he possessed a driving certificate issued by any institution recognized by the State Government.

But under the Motor Vehicles (Amendment) Act, 2019, the licensing system is being digitized and the identification of the applicant is now linked as per the Unique Identifier (UID) mechanism. Further, the minimum educational qualifications for transport drivers has been omitted.

Similarly,the necessity of possessing a licence to drive a light motor vehicle for at least one year before applying for a learners licence to drive a transport vehicle has been removed. So an applicant can now directly apply for the class of vehicle in which he has received training through an accredited school.

Now the renewal of transport licences under Section 14 (2) (a) has been increased to five years from three years. The renewal of transport licences for driving vehicles with

hazardous goods has been increased to three years from one year.

To facilitate the grant of licences in a transparent and efficient manner, insertion of Section 25A in the amended Act,2019 provides for the establishment of 'National Register for Driving Licences' containing data on all driving licences issued throughout India.

The State Registers are subsumed in the National Register. It specifies that a driving licence is valid, only if it is issued with a 'Unique Driving Licence Number' under the National Register of Driving Licences.

"The exemption from taking the test of competence is allowed, only if the applicant produces a certificate from an established school given in the second proviso to Section 9 (3)" has now been omitted.

The renewal period of a licence has been fixed at intervals of 10 years (for forty years and fifty years of age) after the age of thirty years. The renewal period after attaining the age of fifty-five years has been fixed at every 5 years.

Amendment to Section 19 provides for the licensing authority to disqualify a person from holding a licence and place his name in public domain, if he does not successfully complete a driver 'Refresher training course' from an established school after a certain number of offences.

Under Section 27, the Central Government has been given the power to make rules for:

- The form and manner in which the licensing authority shall issue licences.

- The curriculum and training modules for the regulation of schools and establishments referred to in Section 12.

- The manner of placing a licence holder's name in the public domain for disqualification due to a certain number of offences.

- The nature, syllabus and duration of driver refresher training course.

- The matters referred to in Section 25A, i.e., maintenance of National Registers for driving licences

F. REGISTRATION OF NEW MOTOR VEHICLES BY VEHICLE DEALERS:

Under Section 41 of the Motor Vehicles Act, 1988, vehicle dealers cannot carry out registration of motor vehicles.

But as per Section 41 of the Motor Vehicles (Amendment) Act, 2019, the vehicle dealers can now register new vehicles. The newly registered vehicles should have distinguishable registration marks. There is also penalties

for dealers who fail to duly register a vehicle or falter in their duties. Such dealers are fined upto Rs 15,000/-.

G. STRICT REGULATION OF HEAVY MOTOR VEHICLES (HMVS):

Section 72 of the Amendment Act, 2029 (Grant of Stage Carriage Permit) gives the power to the Regional Power Authority to waive any condition to obtain a permit for a stage carriage in rural areas.

The Act automated fitness testing for transport vehicles.

Amendment to Section 117 mandates the State governments to prioritize the safety of road users and ensure free flow of traffic while designating parking zones.

H. STRINGENT PUNISHMENT FOR DRUNK-DRIVING, OVER-SPEEDING, VIOLATION OF HELMET AND SEAT-BELT LAWS:

Offences & Penalties Chapter under the Motor Vehicles (Amendment) Act, 2019 provide stringent penalties for grave offences like drunken driving, over speeding, non wearing of seat belts and helmets etc.

I. REVISION OF FINES:

In the Motor Vehicles Act, 1988, there was no provision for a steady increase of fine. But under the Motor Vehicle (Amendment) Act, 2019, there is provision to increase all

fines under the Act @10% on an annual basis on the 1st day of April of every year.

J. ELECTRONIC MONITORING AND ENFORCEMENT OF ROAD SAFETY:

Under the Motor Vehicles Act, 1988, the electronic enforcement of road safety differed across States. But under the Motor Vehicles (Amendment) Act , 2019, the Central Government provides rules for the electronic monitoring and enforcement of road safety.

K. OFFENCES BY JUVENILES:

Under the Motor Vehicles Act, 1988, allowing unauthorized persons to drive a vehicle invites a penalty of Rs. 1000/- and/or imprisonment of up to three months. Occasionally, provisions of the Indian Penal Code such as Section 109 (Abetment) read with either Section 304 II/ Section 304A in case of death or Section 337-339 of the IPC in case of injury are invoked.

But under the Motor Vehicles (Amendment) Act, 2019: adult accountability is invoked by imposing penalties for the guardian/owner of the vehicle for offences committed by Juveniles.

The guardian or owner of the vehicle is punished with a fine of Rs. 25000/- and/or imprisonment of upto 3 years, while the Juvenile is tried under JJ Act. Additionally, the registration of said motor vehicle is cancelled. The burden of proof lies on the guardian/owner.

L. DANGEROUS DRIVING:

In the Motor Vehicles Act, 1988 the definition of 'driving dangerously' did not take into account the common traffic offences such as 'jumping red lights' and 'using mobile phones while driving'.

Furthermore, considering the nature of offences, the fine prescribed was Rs1,000/- only.

But in the Motor Vehicles (Amendment) Act, 2019, besides enhancing penalties for dangerous driving, the definition of "dangerous driving" now includes the acts that are considered driving in manner dangerous to the public such as jumping a red light, violating a stop sign, use of hand-held communication devices while driving, driving against the flow of traffic, and passing or overtaking any motor-vehicle in a manner contrary to law.

M. . PENALTY FOR OFFENCES RELATED TO CONSTRUCTION AND MAINTENANCE OF VEHICLES:

Under the Motor Vehicles Act, 1988, the punishment for offences relating to construction and maintenance of vehicles was Rs 1,000/- for the first offence and Rs 5,000/- for any subsequent offence.

But the Motor Vehicles (Amendment) Act, 2019, Amendment to Section 182A has enhanced the penalties for contravention of chapter VII (Construction and maintenance of vehicles) by manufacturers, dealers, importers and owners of motor vehicles. It also provides a

penalty for registration and issuance of certificate of fitness to oversized vehicles.

The penalty contravention of chapter VII is imprisonment upto one year or a fine upto Rs 1,00,000/- or both.

The penalty for failing to comply with the provisions of chapter VII during manufacture is imprisonment upto one year or fine upto Rs One Hundred Crore or both.

N. CASHLESS TREATMENT OF VICTIMS OF ROAD ACCIDENTS:

Under the Motor Vehicles Amendment Act, 2019, there is provision for cashless medical treatment of victims of road accidents during the golden hour. Golden hour is the time period up to one hour from the time of the accident. This is the time period in which the chances of survival if proper treatment is given, are maximum. An effort to make this whole process cashless is also provided by this Act.

O. PROTECTION OF GOOD SAMARITAN:

This Act defines a Samaritan as a person who stands up for helping a road accident victim immediately after such accident takes place. However, these generous people are harassed for their acts of kindness. The Amendment Act,2019 ensures that they are not harmed in any manner whatsoever. It also protects them from any kind of civil or criminal proceedings, even in cases where they negligently cause the death of the victim.

P. MOTOR VEHICLES ACCIDENT FUND:

The MV Amendment Act, 2019 directs the central government to establish a "Motor Vehicles Accident Fund" providing compulsory insurance to all drivers of India, who constantly face the risk of death or injury while driving motor vehicles.

Q. NATIONAL ROAD SAFETY BOARD:

Under the Motor Vehicles Act, 1988, there was no provision for a national body for road safety. But the Motor Vehicles (Amendment) Act, 2019 establishes a "National Road Safety Board".

The Board renders advice to the Union as well as State Government on all aspects of road safety and traffic management including the standards of road design, vehicle maintenance, road maintenance, sustainable utilization of road transport, safety of vulnerable road users, road construction technology, motor vehicle standards, etc.

R. TRANSPORT TECHNOLOGY AGGREGATORS

The Motor Vehicles Act, 1988 did not recognize aggregators of transport like cab service providers etc.

The present Motor Vehicles (Amendment) Act, 2019 gives statutory recognition to transport aggregators(Transport Technology Aggregator is any entity that offers a digital (online or app based) platform/market place wherein individual taxi operators could offer their services, and

passengers can avail the same as and when required for eg., Ola, Uber etc.,

S. NATIONAL TRANSPORTATION POLICY:

In the Motor Vehicles Act, 1988, there were no provisions for formulating a unified transportation policy for the country. But the Motor Vehicles (Amendment) Act, 2019 empowers the Central Government to implement a "National Transportation Policy" in consultation with the State governments.

T. PENALTY MULTIPLIER:

Under the Motor Vehicles Act, 1988, there was no provision for the State Governments to multiply the levy of any penalties. But under the Mo tor Vehicles (Amendment) Act, 2019, the State Governments have powers to specify a "multiplier" (not less than one time and not greater than ten times) to apply to each fine.

U. HIT AND RUN CASES:

In Hit and Run cases, where the motor vehicle which caused the accident could not be traced, the Motor Vehicles Act, 1988 provided a compensation of Rs 12,500 /- in case of grievous injury and in case of death Rs 25,000/-

But section 161 of the present Amended Act, 2019 Act has substantially increased the compensation amount from Rs 12,500 /- to Rs. 50,000/- in case of grievous injury and from Rs 25,000/- to Rs. 2 lakhs in case of death.

The above compensations are paid from " **Solatium Fund**", a special fund maintained by state governments.

V. NO FAULT LIABILITY CASES:

a. If the negligence cannot be fixed on the driver of the motor vehicle causing the accident, and if the accident has resulted in grievous injury or death, then owner or his insurance company is liable to pay interim compensation.

b. Under the Motor Vehicles Act,1988, the compensation for grievous hurt was Rs 25,000/- only and for death, it was Rs 50,000/-only.

c. Under the Motor Vehicles Amendment Act,2019, the compensation amount has been enhanced to Rs 2,50,000/- for grievous hurt and to Rs 5,00,000/- for death.

d. The compensation is paid without proof of negligence of the vehicle causing the accident.

e. However, this compensation paid under 'no fault liability' is adjustable in the final compensation award amount payable under any other law.

W. FAULT LIABILITY CASES:

i. The final compensation is called 'Fault Liability'.

ii. After following summary trial, the "Motor Accident Claims tribunal" constituted specifically to hear motor

accident cases awards 'just compensation. The just compensation is arrived at based on the oral and documentary evidence adduced by the disputing parties.

iii. The claim petition may also be settled through compromise before 'Lok Adalat' being conducted regularly in the court premises.

X. CONCLUSION:

The changes brought about by the Motor Vehicles Amendment Act, 2019 are to improve the existing Indian road transportation system and also to discipline the road users by enhancing the penalty amounts leviable against them. By enhancing the victim compensation amounts substantially, the amended Act has fulfilled the social welfare obligation.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the Salient Features of the Motor Vehicles Amendment Act, 2019 in comparison with the Motor Vehicles Act, 1988.*
2. *Explain the Compulsory insurance (Third Party / Act Insurance) of Motor Vehicles under the Motor Vehicles Act, 1988 and changes brought about by the Motor Vehicles Amendment Act, 2019.*
3. *Motor Vehicles Amendment Act, 2019 is a social welfare legislation in true sense – Discuss.*

4. *How compensation amounts payable to the accident victim/his or her legal heirs is determined under the Motor Vehicles Amendment Act, 2019.*

5. *Write Short Note on:*

   (a) Safety of pedestrians and non-motorised transport.

   b) Penalty for offences related to construction and maintenance of vehicles

   c) Dangerous driving

   d) Efficient driver's licensing system

   e) Safety of children during their travel

   f) Safety of pedestrians and non-motorised transport

   g) No fault liability

   h) Solatium fund (Hit and Run cases)

2. NO FAULT LIABILITY (LIABILITY WITHOUT FAULT)

SYNOPSIS:

A. *Meaning*
B. *Background of the laws relating to Motor Vehicles*
C. *Judicial History of No Fault Liability*
D. *No Fault Liability under the Motor Vehicle Act, 1988*
E. *Enhanced Compensation for No Fault Liability under the Motor Vehicle Amendment Act, 2019*
F. *Important Case Laws*

A. MEANING:

The 'No fault liability' principle compensates the victims of accidents arising out of the use of motor vehicles, even in the absence of fault (negligence) on the part of drivers/ riders of such motor vehicles.

In simple terms, a fixed compensation is payable to the victims/ his legal heirs without proof of negligence on either party.

It means that even if the accident has happened purely due to the negligence of the victim, still the compensation is payable to the victim/ his legal heirs on the principle of No fault liability. No-fault liability arises due to accidents in Public places only.

In Law of Torts, 'No fault liability' is called 'Absolute Liability' or 'Strict Liability'. The principle was first introduced in the Motor Vehicles Act, 1988 for the welfare of victims.

Gujarat State Road Transport v. Ramanbhai Prabhatbhai,

In this case, the Supreme Court observed -

"To meet the responsibility of the society to the deaths and injuries caused in road accidents, there has been a continuous agitation throughout the world to make the liability for compensation arising out of motor vehicles accidents as a liability without fault."

It means that the entire compensation should be paid without going into the aspect of negligence.

B. BACKGROUND OF THE LAWS RELATING TO MOTOR VEHICLES:

1. The Indian Motor Vehicles Act, 1914 was the first legislation relating to motor vehicles in India.

2. This enactment was later replaced by the Motor Vehicle Act, 1939. Even after several amendments in the Act of 1939, due to the rapidly changing road transport industry, it was felt necessary to enact a new comprehensive legislation to more effectively regulate the motors trade.Hence the Motor Vehicle Act, 1988 came into existence.

Even after passing the Motor Vehicles Act,1988, further rapid advancement in motor trade and rapid increase in road traffic forced the Parliament to enact the Motor Vehicles Amendment Act, 2019

C. JUDICIAL HISTORY OF NO FAULT LIABILITY:

It was in the case of Manushri Raha v. B.L. Gupta, the Supreme Court recommended the introduction of 'no-fault liability' principle.

The Law Commission of India also recommended for the same, and accordingly, the Motor Vehicles Act, 1939 was amended to introduce Sections 92-A to 92-E. These sections provided for payment of compensation on the basis of no-fault liability principle.

Concord India Insurance Co. v. Nirmala

In this case, Justice V.R. Krishnayyar observed, "the jurisprudence of compensation for motor accidents must develop in the direction of no-fault liability. The determination of the quantum of compensation must be liberal, since the law values life and limb in a free country in generous scales."

The Act of 1939 was later repealed by the Amendment Act of 1982, and to replace it, the Motor Vehicle Act, 1988 was enacted by the Parliament.

The Motor Vehicles Amendment Act, 2019 substantially enhanced the no fault liability compensation amount payable to victims/ legal heirs.

D. NO FAULT LIABILITY UNDER THE MOTOR VEHICLE ACT, 1988:

No-fault liability was incorporated under Chapter X in Sections 140-144 of the Motor Vehicle Act, 1988 and 2019. Section 140 deals with liability without fault. It deals with the death or permanent disability of any person arising out of the use of the motor vehicle(s).

The owner(s) are made jointly and severally liable to pay compensation to victims/ legal heirs.

Under the Motor Vehicles Act,1988, in case of death, the no fault liability compensation amount was fixed at Rs. 50,000/-, and in case of permanent disability, the no fault liability compensation amount was fixed at Rs. 25,000/-

Under the no fault liability principle, the claimant is not required to plead negligence on part of the owner or driver. The claim for compensation by the claimant is not defeated by "wrongful act, neglect or default" on the part of the person who suffered death or permanent disability.

E. ENHANCED COMPENSATION FOR NO FAULT LIABILITY UNDER THE MOTOR VEHICLE AMENDMENT ACT, 2019

Sec. 164 deals with the payment of compensation in case of death or grevious hurt, etc. in no fault liability cases.

1. As per this section, the amount of compensation payable in respect of death of any person has been enhanced from Rs 50,000/- to Rs Five Lakhs under the Motor Vehicles Amendment Act,2019.

2. The amount of compensation payable in respect of grievous hurt of any person has been enhanced from Rs 25,000/- to Rs 2,50,000 /- under the Motor Vehicles Amendment Act,2019.

3. Compensation awarded under this section does not bar the victim to claim compensation under any other law.

   However, the amount of such compensation to be given under any other law is reduced from the amount of compensation payable under this Section 164 or under Section 163 – A of this Act.

4. Section 142 states that the person will be regarded as permanently disabled if he lost his either eye sights or hearing of either ear or privation of any member or joint or destruction or permanent imparting of the power of any member or any injuries in his head or face which can't be recovered.

5. Sec 143 states that the doctrine of no-fault liability shall also apply to any claim for compensation in respect of death or permanent disability under the Workmen Compensation Act,1923.

F. IMPORTANT CASE LAWS:

1. S. Kaushnum began v. New India Assurance Co. Ltd (2001):

In this case, though the driver was not negligent in causing death of the victim, the tribunal held that the owner

was liable to pay compensation to the claimant's legal heirs under no fault liability.

Section 141 states that a person is liable to pay more compensation if any other provision or scheme applies to him apart from the Motor Vehicles Amendment Act, 2019.

2. *SatvantkumarHarjit Singh Vig v. Aarti Jayant Lalwani:*

The Court held that the phrase 'has resulted from' under Section 140 of the Motor Vehicles Act, 1988 does not require the death to occur in the accident itself.

The Section is applicable even where death is the result or the consequence of the accident arising out of a motor vehicle. What is necessary is that whether the death is the consequence of an accident arising out of use of motor vehicle or not. That is sufficient to fasten liability under 'No Fault Liability' principle.

3. *In National Insurance Co. Ltd. v. Honnappa:*

In a claim under no fault liability, the Court held that the claimant need not plead or establish that permanent disablement was due to wrongful act or negligence or the default of driver of the other vehicle.

Further, the right to claim compensation under Section 140 in respect of death or permanent disablement of any person is in addition to any other right, except the right to claim under the Scheme referred to in Section 163–A.

A claim for compensation under Section 140 in respect of death or permanent disablement of any person should be disposed of as expeditiously as possible.

UNIVERSITY QUESTIONS FOR REVIEW :

1. *Explain 'No Fault Liability'. What is the quantum of compensation payable for death or disablement under No Fault Liability under the Motor Vehicles Amendment Act, 2019.*

2. *Explain the provisions relating to principle of 'No Fault Liability' under the Motor Vehicles Amendment Act, 2019.*

3. *Write short note on- a)No Fault Liability b) Compensation for No Fault Liability.*

3. THIRD PARTY INSURANCE

SYNOPSIS:

A. ***Meaning***
B. ***Definition of Third Party***
C. ***Necessity of insurance against third party risk(Sec. 146)***
D. ***Parties in third party Insurance***
E. ***Uses of Compulsory Third-Party Insurance***
F. ***Procedure of claim settlement with the insurance company***
G. ***Inclusions / Exclusions in third party Insurance Policy***
H. ***Hit and Run Cases***

Third-party insurance is a statutory requirement for all vehicle owners as per the Motor Vehicle Act, 1939, 1988 and Amendment Act,2019.

Third-party insurance is also referred to as **'Act-only' insurance. or 'Statutory insurance'.**

By third party insurance, an insurance company offers protection to owner/s of motor vehicle against damage or loss to the third-party vehicle, damage or loss to third party property and physical injury or death of a third party.

The third party policy does not provide any protection in the form of compensation to the insurer/ owner of the motor vehicle for his vehicle damage or for his injury or death. The owner has to take a different policy called "Personal Accident Insurance Policy ".

B. DEFINITION OF THIRD PARTY:

"Third party" is a person other than the contracting parties in the insurance policy. namely the insurer and the insured. It includes a person travelling in another vehicle, walking on the road or a passenger in the insured vehicle itself. Third party includes government also.

C. NECESSITY OF INSURANCE AGAINST THIRD PARTY RISK (Sec. 146):

1. The third party Insurance for a motor vehicle is very much needed when the vehicle causes accident resulting in injury or death of a third party or damage or loss to third party property. Thus it protects the innocent road users by assuring them payment of just compensation in the event of accident to them by use of motor vehicle/s.

2. By payment of compensation by insurance company, the insured ie the owner of the motor vehicle is financially protected. It saves the insured from paying compensation to the victims from his pocket. The premium amount payable by the owner of a motor vehicle for third party Insurance is decided by 'Insurance Regulatory and Development Authority'(IRDA) based on the claims ratio.

3. Sec. 146 of the Motor Vehicles Act, 2019 has made third party Insurance compulsory, if it is used in a 'PUBLIC PLACE'.

A public place is a location to which all of the public have right of access and is not a place exclusively used for a private gathering or any other personal purposes.

4. Sec 146 reads -

"A person should not use, or cause or allow any other person to use a motor vehicle in a public place without a policy of insurance complying with the requirements of the Motor Vehicles Act,2019."

D. PARTIES IN THIRD PARTY INSURANCE:

1. A third party insurance policy is a policy under which the insurance company agrees to indemnify the insured person, if the insured person is sued or held legally liable for injuries, death or damage or loss done to a third party.

2. The insurance company is the first party. The insured person is the second party. The person who claims for injury, death or damage or loss to his properties is the third party.

E. USES OF COMPULSORY THIRD-PARTY INSURANCE:

1. Third-party insurance offers a basic level protection to all policy holders.

2. If a policyholder meets with an accident, then the insurance company offers financial compensation to pay for the injury/ ies or death of victim/s and /or also

cost of repairs to the third-party vehicle/ property. Thus, it reduces the financial burden of the policyholder and also gives him peace of mind that he will be financially protected by insurance company in the event of any loss,damage, injury or death of third party/ies.

3. Because the third party Insurance is made compulsory, the road users especially the pedestrians are assured of compensation in case of injury or death or damage or loss of their properties.

F. PROCEDURE OF CLAIM SETTLEMENT WITH THE INSURANCE COMPANY:

I. General Procedure:

To get compensation from the insurance company, the policyholder must comply with the claim rules.

The process of third-party insurance claim involves the following steps:

1. First and foremost, the insured must inform the insurance company about the accident within the stipulated period as mentioned in the policy.

2. The policyholder must file an FIR at the nearest police station and get a copy of the same.

3. He must fill up the claim form and submit the vehicular records and FIR along with it.

II. FOR THIRD PARTY INJURY / DEATH:

1. In the event of injury/ death of a third party, the third party (in injury claim)or his legal heirs (in death claim) must lodge a claim for compensation with the owner of the motor vehicle and also his insurance company by sending a registered letter.

2. The insurance company may settle the claim by paying just compensation directly to the third party/ his legal heirs and report such settlement to the concerned Motor Accident Claims Tribunal.

3. Alternatively, the third party may file a petition directly or through his advocate before Motor Accident Claims Tribunal to claim compensation.

a. 'No fault liability' Compensation:

i. If the negligence cannot be fixed on the driver of the motor vehicle causing the accident, and if the accident has resulted in grievous injury or death, the owner or his insurance company is liable to pay interim compensation.

Under the Motor Vehicles Act,1988, the compensation for grievous hurt was Rs 25,000/- and for death was Rs 50,000/-

Under the Motor Vehicles Amendment Act,2019, the compensation for grievous hurt has been enhanced to Rs 2,50,000/- for grievous hurt and Rs 5,00,000/- for death.

ii. The compensation is paid without proof of negligence of the vehicle causing the accident.

iii. However, this compensation paid under 'no fault' is deductible when the motor accident claims tribunal arrives at final compensation, after deciding the negligence aspect.

b. 'Fault Liability' Compensation:

i. The final compensation is called Fault Liability. Fault Liability compensation cannot be less than no fault liability compensation.

ii. After following quasi judicial proceeding(summary trial), the tribunal awards just compensation after scrutiny of necessary documents and examination of necessary witnesses.

iii. The claim petition may also be settled through compromise before 'Lok Adalat' conducted regularly in the court premises.

III. For Third Party Property Damage/Loss:

1. When the claim is filed, the insurer appoints a surveyor to assess the damage and verify the estimated cost of repairs.

2. Once the verification is completed, the insurer settles the property damage claim as per the survey report.

G. INCLUSIONS / EXCLUSIONS IN THIRD PARTY INSURANCE POLICY:

I. Inclusions:

Third-party insurance offers protection against physical injuries, death, damage to the third party vehicle, damage to other properties of third party.

II. Exclusions:

Third-party insurance does not provide any compensation, if:

1. The accident was caused due to drunken driving.
2. The driver is under aged.
3. The accident was caused by an intentional act.
4. The vehicle was used for hire and reward when it was not so permitted.
5. The vehicle was used for organised racing and speed testing;
6. A transport vehicle was used for purposes not allowed by permit.
7. When the driver was not holding a valid driving license or has been disqualified from holding such license.
8. Policy taken is void as the same was obtained by non-disclosure of material fact.

H. HIT AND RUN CASES:

1. In a motor accident causing grievous injury or death to a third party, if the vehicle causing the accident cannot be identified, then the compensation is paid from a fund called " Solatium Fund"maintained by state governments.

2. For grievous injury/ies, the compensation payable is Rs Rs 50,000/- and for death, the compensation payable is Rs 2,00,000/-under the Motor Vehicles Amendment Act,2019. The compensation is paid by the District revenue head of the state government.

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain what is meant by third party Insurance. What is the procedure of settlement of third party Insurance claim?*

2. *Third party Insurance is compulsory - Discuss.*

3. *Write short note on- a) Third party Insurance b)Procedure of third party claims c)No fault liability d) Hit and Run cases e)Solatium Fund f)Third party g)Defences to the insurer h) Inclusions and Exclusions under the third party Insurance policy.*

4. MOTOR ACCIDENT CLAIMS TRIBUNAL(MACT) (PROCEDURE OF CLAIMING COMPENSATION UNDER THE MOTOR VEHICLES ACT, 1988 AND AMENDMENT ACT, 2019)

SYNOPSIS:

A. Introduction

B. Proceedings Before MACT

C. Persons entitled to file Third Party Claim

D. Compensation under the Workmen's Compensation Act and the M.V.Act

E. Documents necessary to file a claim for Third Party Compensation

F. Powers of Claim Tribunals (Sec. 169)

G. Determination of Negligence and Quantum of Compensation

H. Appeals

I. Recovery of money from insurer as arrear of land revenue (Sec.174)

J. Case Laws

A. INTRODUCTION:

Under the old Motor Vehicles Act, 1939, a new quasi judicial body namely, the Motor Accident Claims Tribunal (MACT) was established in the place of Civil Courts.

The MACTs were created with the intention of providing a cheaper and speedier remedy to the victims of motor vehicle accidents.

The MACTis located in every district headquarters and other notified places by the state government. It is headed by Sub judge or District Judge. He is called the Presiding officer of the Tribunal.

B. PROCEEDINGS BEFORE MACT:

1. The proceedings are instituted by filing a petition for compensation by the victim /legal heirs of the victim.

2. Sec. 166 of the M.V. Act, 1988 provides for the form of application for compensation. It also provides that as per Sec.158 of the Act, the Claims Tribunal may treat the accident Report filed by the Police Officer as an application under the Act.

3. On admitting a petition for compensation under Sec.166 of the Act, the Tribunal sends a notice to the driver, owner and Insurance company concerned and give the parties an opportunity of being heard.

4. After an inquiry into the case, it passes an Award specifying the amount of compensation payable to the victim or his legal heirs individually.

5. The Award also specifies the amount to be borne by the Insurer, the Owner of the vehicle in individual capacity or collectively.

C. PERSONS ENTITLED TO FILE THIRD PARTY CLAIM:

1. In case of damage to property, the application for compensation has to be made by the Owner of the property or his legal heir in case he is deceased.

2. In case of injury, the persons injured may themselves file for compensation.

3. Persons who are less than 18 years of age cannot file for compensation on their own, and they should route it through their Guardians only.

4. The major legal heirs of death victims in the accident can themselves directly claim compensation, but the minor legal heirs must claim through their guardians only.

5. The Claims Tribunal should treat any report of accidents forwarded to it under section 158(6) of the Act as an application for compensation.

6. Though there is no time limit for filing motor vehicle accident claims, an unusual delay will demand an explanation from the claimants by the Tribunal.

D. COMPENSATION UNDER THE WORKMEN'S COMPENSATION ACT AND THE M.V.ACT:

In a case where the death or injury due to accident gives rise to compensation both under the Workmen's Compensation Act and the M.V.Act, the person can seek under any one of the Acts only and not under both the Acts as per Sec. 167 of the Act.

E. DOCUMENTS NECESSARY TO FILE A CLAIM FOR THIRD PARTY COMPENSATION

The following documents are required to be furnished along with the application for compensation:

1. Copy of the FIR registered in respect of the accident.

2. Copy of the Panchnama (this is a list of damages and a record of the accident by Police in the presence of witnesses).

3. Copy of the Post mortem report or Death report.

4. Identity proof of the Claimants in relation to the deceased.

5. Original Medical Bills and Medical Treatment Records (in cases where treatment was given prior to death or in injury cases).

6. Documents regarding the educational qualifications of the deceased.

7. Disability Certificate (if already issued) in injury cases.

8. Income proof of the Injured/Deceased.

9. Age proof of the Injured/Deceased.

10. Motor Insurance Policy.

11. An affidavit detailing the relationship of the claimants with the deceased.

12. RTO Certificate (showing name and address of owner and insurance particulars of vehicle/s involved in the mishap).

13. Passport-Size Photograph

14. Vehicular documents like Registration Certificate , Trip sheet, Driving License, Permit. etc., to be submitted by the owner of the vehicle.

15. Court-Fee Stamps for filing an application for compensation.

F. POWERS OF CLAIM TRIBUNALS (Sec. 169):

1. Section 169 expressly empowers the claims tribunal to formulate its own summary procedure as it thinks fit. The intention is that the enquiry should not take the shape of long-drawn proceedings as a regular civil suit, but should be concluded as much speedily as possible.

2. The Claims Tribunal has all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other prescribed purposes.

3. The Claims Tribunal is deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

G. DETERMINATION OF NEGLIGENCE AND QUANTUM OF COMPENSATION:

I. NEGLIGENCE:

The negligence is decided based on deposition of evidence by witnesses and documentary evidence like spot Mahazar , FIR, Sec 161 Crpc statements of witnesses etc.,

II. QUANTUM OF COMPENSATION:

a. Death cases:

The quantum of compensation in death cases is assessed by the age of the deceased at the time of accident,

his yearly/ monthly income proved through documentary evidence and if there is no documentary proof, the MACT takes into account the 'notional income' as under the I st schedule of MV Act,2019, the multiplier system and also the guidelines laid down by Supreme Court in its judgements.

The MACT also takes into account the loss of future prospects, loss of love and affection, loss of consortium, 1/ 3rd deductions for self expenses of the deceased etc.,

b. Injury cases:

If it is simple injury, then compensation is nominal amount and it is at the discretion of the MACT, guided by judicial precedents.

If it is grievous injury, the MACT considers the percentage of physical disability and percentage of functional disability, medical expenses - present and future, loss of income due to disability, percentage of loss of future income, expenses for nursing and physical care assistance etc.,

The assessment of compensation by MACT in grievous injury claims is guided by Supreme Court and High Courts' judgements.

H. APPEALS:

Appeals from MACT lies with the concerned High Court. The appeal has to be filed in the High Court within 90 days from the date of award of Claims Tribunal.

The High Court may entertain the appeal even after the expiry of the said period of ninety days, only if there was sufficient cause preventing the appellant from preferring the appeal in time.

I. RECOVERY OF MONEY FROM INSURER AS ARREAR OF LAND REVENUE (Sec. 174):

If any amount is due from any person under an award, the Claims Tribunal may, on an application made to it by the person entitled to the amount, issues a certificate for the amount to the Collector and the Collector proceeds to recover the same in the same manner as an arrear of land revenue.

J. CASE LAWS:

1. Sona v. G.M. Haryana Roadways:

The Supreme Court held that the MV Act is a legislation which was enacted for the benefit of the claimants. Therefore the rule of strict compliance of the provisions of CPC is not to be applied to accident cases

2. National Insurance Co.Ltd. V. Jumrati:

The Supreme Court held that Motor accident claims tribunal in order to achieve the object for which it was set up is deemed to have a power to review its own order, if such order is found to contain errors which are fundamental and destructive of the provisions of the motor vehicle Act.

3. In an important ruling Justice Ramana of Summarised his views regarding the issue of calculation of "Notional Income" for homemakers and the grant of future prospects with respect to them, for the purposes of grant of compensation,

4. ***State of Haryana v. Jasbir Kaur:***

The Supreme Court held that courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just.

5. ***Sarla Verma (Smt.) & Others Vs. Delhi Transport Corporation & Another (2009) 6 SCC 121:***

In this case, the Supreme Court worked out the table of multiplier taking into account the judgments passed in various cases

6. ***Reshma Kumari & Others Vs. Madan Mohan & Another; (2013) 9 SCC 65;***

In this case, the Supreme Court approved the parameters of determining the compensation in the judgment of Sarla Verma

7. ***National Insurance Company Ltd. Vs Pranay Sethi & Others; (2017) 16 SCC 680 :***

In this case, the Supreme Court though approved the parameters of determining the compensation in the judgment of Sarla Verma but made a few more additions

8. *Royal Subdram Alliance Insurance Co. Ltd. Vs. Mandala Yandagri Goud & Ors.; (2019) 5 SCC 554*

In this case the court held that the age of deceased, and not of the dependent, is relevant for adopting the multiplier.

UNIVERSITY QUESTIONS FOR REVIEW

1. *What is the procedure for Claiming under the Motor Vehicles Act, 1988?*

2. *The Motor Vehicles Act, 1988 and 2019 has constituted Motor Accident Claims Tribunals to hear motor accident cases and award compensation to Motor accident victims – Comment.*

3. *Write short note on: (a) Procedure of claiming compensation under the Motor Vehicles Act, 1988 (b) Documents required to claim compensation under the Motor Vehicles Act, 1988 and 2019. c) Assessment of compensation in death and grievous injury cases.*

5. OFFENCES AND PENALTIES UNDER THE MOTOR VEHICLE ACT, 1988 AND AMENDMENT ACT, 2019

SYNOPSIS:

A. *Introduction*
B. *Objective of Amendment 2019*
C. *Offences covered under Motor Vehicle Act, 2019*
D. *New changes under Motor Vehicle Act,2019*
E. *Reasons for hike in fine amount*
F. *Revised Penalties Table*
G. *Conclusion*

A. INTRODUCTION:

The Motor Vehicle (Amendment) Act, 2019 has introduced several new traffic fines and it has increased the existing fines substantially.

The stricter penalties now help the authorities to reduce the number of road accidents caused due to negligent driving.

B. OBJECTIVE OF AMENDMENT 2019:

The objective of the amendment 2019 is to bring changes in the transport sector to encourage safer driving practices among Indian motor vehicle drivers.

C. OFFENCES COVERED UNDER MOTOR VEHICLE ACT, 2019:

Under the new Motor Vehicle Act 2019, the penalties for almost all driving errors have gone up significantly, especially for serious offences like drunken driving.

D. NEW CHANGES UNDER MOTOR VEHICLE ACT, 2019:

The Traffic Rules in India are set as per the New Motor Vehicle Amendment Act, 2019.

Under the revised Act, the penalties for traffic violations have been increased significantly and have become more stringent than ever.

I. Driving Without License:

If a person is caught driving without a licence, a fine of Rs 5,000/- is required to be paid. This is an increase of ten times from the earlier fine of Rs. 500/-.

II. Driving Without Insurance:

As per the new Motor Vehicle Act 2019, the penalty for driving without insurance for the motor vehicle has been increased from Rs 1,000/-and /or imprisonment of upto 3 months to Rs 2,000/- and/or imprisonment of upto 3 months for the first-time offenders and Rs 4,000 /- and/or imprisonment of upto 3 months for the second-time offenders.

III. Driving With Disqualified Driving Licence :

In case a person is found driving with a disqualified licence, he can be fined with Rs 10,000/-. This fine was earlier just Rs.500/-

IV. Driving Under the Influence of Alcohol or Intoxicating Substance:

Drunken driving or driving under the influence of alcohol or narcotic substance is a serious offence, as it poses a great risk to the safety of both the driver and that of other road users.

Hence, as per the new traffic rules and fines, the penalty that the offender has to pay has been increased by several times. Compared to the old penalty of Rs 2,000/-, a first-time offender now has to pay Rs 10,000/- and/or undergo imprisonment of 6 months. Also, the second time offender has to pay Rs 15,000/- and can face up to 2 years imprisonment.

V. Not Wearing a Helmet:

The traffic fine for riding a two-wheeler without wearing an ISI-approved helmet has been increased from Rs 100/- earlier to Rs.1,000/- now.

VI. Racing and Speed-testing:

Another highly serious offence that is often committed on our roads is that of racing and speed-testing. For this, the fine has now been increased from Rs.500/- to Rs.5,000/

- and/or imprisonment of up to 3 months for the first-time offenders and Rs.10,000/- and/or imprisonment of up to 1 year for repeat offenders.

VII. Offences by Juveniles:

As before, there is no punishment to the juvenile, but the owner of the vehicle or the guardian of the underage driver now has to pay a fine of Rs.25,000/- along with facing imprisonment of 3 years.

VIII. Offences Committed by Enforcing Officers:

As per the Motor Vehicle Act 2019, there is no fixed penalty for this offence, but the new fine is 'double the penalty' under the relevant section.

IX. Having Two Driving Licences:

In case a person is found having two or more driving licenses, he can be penalized. Also, from now, all driving licences that are to be issued will have a smart chip that can be accessed by the traffic police through a QR code.

E. REASONS FOR HIKE IN FINE AMOUNT:

It is high time that people start respecting traffic rules and to become strict in complying with them. So the present Act has drastically hiked the penalties. The increase in the fine amount is to teach people to take rules and regulations more seriously.

F. REVISED PENALTIES TABLE:

New penalty amounts under the Motor Vehicles Amendment Act, 2019

G. CONCLUSION:

The aim of the new Motor Vehicles Amendment Act, 2019 is to ensure that motorists start taking traffic rules more seriously. It is hoped that there will be a serious drop in cases of drunken driving, non-usage of seatbelts, rash driving, over speeding, racing etc.,

UNIVERSITY QUESTIONS FOR REVIEW:

1. *Explain the offence and penalties leviable under the Motor Vehicles Act, 1988 and Amendment Act, 2019.*

2. *The Motor Vehicles Amendment Act, 2019 has substantially enhanced the Penalties and also introduced new offences with stringent punishments - Comment.*

3. *Write short note on-Offences and Penalties under the Motor Vehicles Amendment Act, 2019.*

MODEL SOLVED PROBLEMS

[LAW OF TORTS, THE CONSUMER PROTECTION ACT, 2019 AND THE MOTOR VEHICLES ACT, 1988]

(IMPORTANT NOTE TO STUDENTS)

In this book, We have given sample model problems with answers. we have also published a separate book on Law of Torts - solved problems which has 172 problems with answers. Students are advised to buy the book for gaining thorough knowledge in the subject.

I. LAW OF TORTS

PROBLEM NO. 1

The Plaintiff was running a school. Just opposite to this school, the Defendant started a new School. The students of the Plaintiff's School joined the Defendant's School. The Plaintiff suffered loss and hence sued for damages.

ANSWER:

In the given case, the plaintiff cannot succeed in his suit for damages. According to the maxim "Damnum Sine Injuria", if any loss or damage is caused without violating the legal right of a person, it is not an actionable wrong.

In the case given above, the defendant has not violated his legal right in starting a new school adjacent to that of the plaintiff's.

His act might be harmful to the plaintiff but it is not wrongful, and therefore, it does not give rise to a right of action in favour of the injured party, namely, the plaintiff. (Fair and bonafide competition is always allowed).

The defendant cannot be sued in a Court and the plaintiff cannot claim damages because his loss was caused without violating the legal right of any person.

The facts of the given problem resemble that of the leading case ***'Gloucester Grammar School Case'***, wherein it was held that the plaintiff is not entitled for damages for the loss suffered by him due to the defendant starting a School opposite to his School.

PROBLEM NO. 2

A banker refused to honor a customer's cheque when he had sufficient funds to the credit of the customer. The customer filed a suit for damages against the banker whose defence was that the customer had not sustained any loss. Argue the case of the customer.

ANSWER:

Here, the customer is entitled to damages from the banker, though he had not sustained any loss or damage.

According to the doctrine of 'Injuria Sine Damnum', if the legal right of a person is violated, though there is no loss or damage, it is actionable per se. It is sufficient to show the violation of a legal right, and special damage need not be proved.

In the given case, the customer's legal right namely the honouring of his cheque is violated by the banker. Though the customer did not sustain any monetary loss or reputation, as his legal right is violated, he is entitled to claim damages from the banker - ***Marzetti vs. Williams*** - ***(Please Refer UJLS book, page no. 26)*** .

PROBLEM NO. 3

A fails to save a drowning child. Can he be held tortuously liable?

ANSWER:

No. A is not liable for not saving a drowning child. In order to constitute a tort, there mũst be a wrongful act. The word 'act' here means, both positive and negative acts, i.e., acts and omissions.

The defendant must have done an act, which he should not have done it, or he must have omitted to do an act which he has the duty to do to the plaintiff.

The plaintiff gets a right of action, if any act or omission of the defendant affects any of the following rights of the plaintiff namely right of reputation, right of personal freedom, right to bodily safety, etc. Thus, the wrongful act or omission must result in breach of legal duty owed to the plaintiff. There is no liability in tort for breach of moral or social obligation.

In the given problem, it is only a moral obligation for A to save the drowning child. Since breach of moral obligation does not give rise to any liability, he is not liable for any tort.

PROBLEM NO . 4

'A' sunk a well on his land and thereby cut off underground water supply to his neighbour 'B'. Consequently B's well dried up. A's motive, in so doing, was to not to benefit himself, but to injure his neighbour. B files a suit for damages and injunction against 'A'. Will 'B' succeed. Decide.

ANSWER:

No. B cannot succeed, as the defendant's act was lawful use of his land, though the damage was caused with ill motive –

Malice in fact, in narrow sense - means an evil motive. When the defendant does a wrongful act with a feeling of spite, vengeance or ill-will, then the act is said to be done 'maliciously'. It is also called **'Evil Motive'**.

In tort, motive is immaterial. Motive is not relevant to decide a person's liability in law of torts. A wrongful act does not become lawful, merely because it was committed with the good motive. Similarly, a lawful act does not become wrongful, because it was committed with an evil motive or malice.

Similarly in the famous case of ***Bradford Corporation Vs Pickles,*** The House of Lords, held that though the damage was caused maliciously with evil motive, the defendant's

act was lawful use of his land and hence, the defendant was not liable.

Further it observed that in these types of cases, motive is immaterial. It is only the act and not the motive for the act which must be considered and if the act is legally justified, there is no cause of action under law of tort.

Thus, A is not liable to B for his act of sinking a well in his own land and B cannot succeed in his suit for damages and injunction against A.

PROBLEM NO. 5

The father gave his son aged fifteen an air-gun and allowed him to retain it, after he had smashed neighbour's window with it. The boy injured the eye of another boy with the gun. Explain the liability of father.

ANSWER:

Father is liable for the wrongful act of battery committed by his son, since he has been negligent in allowing his son to do a wrongful act. A minor has no special protection in a suit under the law of torts and he is liable like any other adult member for his tortious acts.

Generally a parent or guardian is not responsible for the torts of the child. However, a parent may be held liable as in the relationship between master and servant, for the child's acts.

For e.g., if the father is negligent in allowing a son to do a wrong, then he is liable to pay compensation on minor's behalf.

In the given problem, the father had been negligent in allowing his minor son to have a gun, even after he had smashed a neighbour's window. So, the father is liable for the battery committed by his son by injuring the eye of another boy.

II. THE CONSUMER PROTECTION ACT, 2019

PROBLEM NO. 1

A was in the chair at a parish meeting. M, who sat at the same table six or seven places away from S, becomes vociferous. It was decided to expel M. M said that he would pull S out of the chair and proceeded towards him with a clenched fist. But he was stopped by the church warden standing nearby. S sues M. Discuss and decide.

ANSWER:

S can sue M and he will be entitled to damages from M. Here, M has committed the tort of "Assault".

"Assault" is the unlawful laying of hands on another or an attempt to do a corporal hurt to another coupled with present ability and intention to do the act.

In the above case, all the three essentials constituting Assault are present and hence M has committed Assault.

a. Gestures or preparation to constitute threat of force.

b. Gestures causing reasonable fear of violence.

c. The wrong doer having the present ability and intention to cause harm.

In the given case, if the church warden had not stopped M, he would have committed battery to S. Thus S can sue M for the tort of assault and recover damages from him. The facts resemble the famous case ***"Stephen's Vs. Myers"***.

PROBLEM NO. 2

A abuses B. B takes out his sword and tells A 'Next time, if you use such language, I will kill you'. Has B committed any tort?

ANSWER:

B has committed the tort of "Assault".

Assault is the unlawful laying of hands on another or an attempt to do a corporal hurt to another, coupled with present ability and intention to do the act.

B has fulfilled all the essential constituents for the tort of assault namely:

1. He has made a gesture or preparation to constitute the threat of force, by taking out his sword.
2. Such gesture or preparation of taking out the sword causes reasonable fear of force.
3. B has the present ability and intention to cause harm. So, B has committed the tort of "Assault".

PROBLEM NO. 3

The defendant in the Court of meeting advanced towards the Chairman of the meeting with his fist clenched, saying he would rather pull the Chairman out of the chair and then, he turned out of the meeting. Is any wrong committed?

ANSWER:

The defendant is liable for the tort of 'Assault'. Assault is the unlawful laying of hands on another an attempt to do a corporal hurt to another, coupled with present ability and intention to do the Act.

The defendant in the given case has made gesture or preparation, indenting to use criminal force on the chairman of the meeting. The Chairman of the meeting is put in fear of violence by defendant's hot words. Defendant also has the present ability to do the Act.

So the defendant is liable for the tort of Assault. The facts of the given case resemble that of a leading case ***"Stephens Vs. Myers"***, where in Myers was held liable for Assault.

PROBLEM NO. 4

A Police Officer handcuffed an under trial prisoner undergoing treatment in a hospital and chained him to a nearby window. Discuss the liability of the Police Officer.

ANSWER:

The Police Officer is liable for the tort of Battery.

1. Battery is the direct intentional application of force to the body of another individual without his consent or lawful justification. There must be some act by the defendant.

2. The Officer had handcuffed the under trial and chained him to a window, like a dangerous animal.

3. When he had handcuffed him, there is no need for chaining him to a window.

4. This is done without the person's consent or will.

5. There is also no lawful justification as the person is undergoing treatment in a hospital.

6. Hence the Officer is liable for Battery. The facts resemble a leading case ***Kedar Vs. K.A. Alagarasami***, wherein the Court held that the defendant was liable to pay damages for the tort of battery.

PROBLEM NO. 5

A wrongfully constructed a road by putting a pole across it. B, riding violently on the road in the dusk was overthrown by the pole and injured. The pole could be seen at a distance of 100 yards. B sues A for damages. A pleads Contributory Negligence on the part of B. Decide stating reasons.

ANSWER:

B cannot sue A for damages, as he is guilty of 'Contributory Negligence'.

Contributory Negligence is the negligence in not avoiding the consequences of negligence of some other persons. Here, the plaintiff, by his want of care, contributed to the damage caused by the negligence of the defendant.

In the given case, A had been negligent in placing a pole across the road, but was also negligent in not avoiding accident thereby contributorily negligent.

Though A could presume that the road is safe for travel the pole was visible 100 yards away and he could have avoided the accident. As B had the opportunity to avoid the accident, but failed to do so by his own negligence, he has committed the tort of 'Contributory Negligence". So B cannot sue A for damages.

The facts of the case resemble the leading case ***Butterfield Vs. Forester.***

III. THE MOTOR VEHICLES ACT, 1988

PROBLEM NO. 1

'A' drove his Motor car in a rash and negligent manner and hit against 'B' a pedestrian and caused the B 's death at the accident spot itself. A did not stop the motor car and sped away. The registration Number of the car could not be noticed. What the remedy available to the legal heirs of 'B' ?

ANSWER:

The above accident is typically a 'Hit and Run ' case.

The Motor Vehicles Act, 1988 is a piece of social legislation and its provisions are designed to protect the rights of road accident victims where the identity of motor vehicle causing the accident cannot be established. The relevant legal provision is enshrined in Section 161 of Motor Vehicles Act.

"Hit and Run motor accident" is defined as an accident arising out of the use of a motor vehicle or motor vehicles the identity whereof cannot be ascertained in spite of reasonable efforts for the purpose.

The compensation for Hit and Run Motor Accident cases is payable under a special fund constituted namely 'Solatium

Fund' maintained by the State Government. It was created under Sec.163 of the Motor Vehicles Act, 1988.

The following are the amounts payable as compensation under the 'Solatium Fund'.

1. In respect of the death of any person resulting from a hit and run motor accident, the compensation amount now (after Amendment Act, 2019) is a fixed sum of Two Lakhs Rupees.

2. In respect of the grievous injury of any person resulting from a hit and run motor accident, the compensation amount now (after Amendment Act, 2019) is a fixed sum of Fifty thousand rupees.

Procedure of Claim in Hit & Run cases:

1. The victim of the 'hit & run' accident or his legal representative makes an application to Claims Enquiry Officer in each Taluk.

2. The Claims Enquiry Officer submits a Report along with a Certificate of Post mortem or Certificate of Injury to the Claim settlement Commissioner, after satisfying himself of the veracity of the case.

3. The Claim settling Commissioner is either a District Collector or Deputy Commissioner at the District level.

4. After processing the claim received from the Claims Enquiry Officer, sanctions payment within a period of 15 days.

5. He communicates the Sanction Order to the nominated office of the Insurance Company.

PROBLEM NO. 2

'A' drove his Motor car rashly and negligently and hit against 'B' who was crossing the road. 'B' died in the accident. Now his legal heirs wants to claim compensation from 'A' and his Insurance Company with which the motor car was insured. What are the types of compensation. 'B's legal heirs can claim?

ANSWER:

There are two types of compensation which the legal heirs of 'B' can claim from 'A' and/or his insurance company

1. No fault liability compensation:

Sections 140 to 144 of the Act, provides for payment of compensation on the principle of no fault liability i.e. without any fault on the part of any party.

Section 140 of the Motor Vehicles Act, 1988 provides for liability to pay compensation in certain cases on the principle of no fault.

If death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicles or the owners of the vehicles are, jointly and severally, liable to pay compensation in respect of such death or disablement as per this Section (Sec.140).

a) The amount of compensation which is payable in respect of the death of any person is a fixed sum of **Rs. 5,00,000/-** and the amount of compensation payable in respect of the grievous hurt of any person shall be a fixed sum of **Rs. 2,50,000/-(Sec. 164 of Amended Act, 2019).**

b) In any claim for compensation under Section 164, the claimant is not required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle/s.

c) A claim for compensation under Section 164 is not defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor the quantum of compensation recoverable in respect of such death or permanent disablement is reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

d) The owner of the vehicle is also liable to pay compensation under any other law for the time being in force:

However, the amount of such compensation to be given under any other law is reduced from the amount of compensation payable under this Section or under Section 163 A".

The quantum of compensation is reduced due to contributory negligence on the part of person who sustained disablement or death.

Compensation awarded under this Section does not bar the victim to claim compensation under any other law. However, the amount of such compensation gets reduced by the amount of compensation payable under no fault liability under this Section or the structured formula laid down under Schedule II, read with Section 164 of the Act.

2. Fault liability compensation:

Chapter 11 provides for compulsory third party insurance, which is required to be taken by every vehicle owner.

Section 147 provides for the requirement of policy and limit of liability. Every vehicle owner is required to take a policy covering against any liability which may be incurred by him in respect of death or bodily injury including owner

of goods or his authorized representative carried in the vehicle or damage to the property of third party and also death or bodily injury to any passenger of a public service vehicle.

According to this Section the policy does not require covering the liability of death or injuries arising to the employees in the course of employment except to the extent of liability under the Workmen Compensation Act.

Under Section 149, the insurer is statutorily liable to satisfy the judgment and award against the person insured in respect of third party risk.

In the above problem, 'B's legal heirs will get Rs. 5 lakhs as compensation under No Fault Liability and additional compensation under Fault Liability which is calculate based on the age of the diseased, his yearly income after 1/3 deductions for his self expenses, his future prospects etc.,

While awarding compensation under Fault liability, the compensation paid under no fault liability will be deducted.

PROBLEM NO. 3

'A' drove his motor car and hit against 'B'. 'B' sustained grievous injuries. What is the compensation payable to him.

ANSWER:

'B' will get two compensation. Compensation under No Fault liability of Rs. 2 ,50,000/- and additional compensation under Fault liability, which is based on the percentage of disability, loss of earning power, Medical expenses incurred (proof needed) and expenses incurred for physical help and attendance etc., While awarding compensation under Fault liability, the compensation paid under No fault liability will be deducted.